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# THE LAW OF INSURANCE IN BRITISH INDIA

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# THE LAW OF INSURANCE IN BRITISH INDIA

INCLUDING THE INDIAN INSURANCE ACT (IV OF 1938)  
(AS AMENDED)

By

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## PREFACE

Although it may be said that nine-tenths of the Insurance Act of 1938 are administrative in scope and intent, the balance of the statute contrives to make a considerable incursion into the Indian law of contract. Prominent among the provisions which illustrate that incursion are those of section 46, by which the holder of a policy issued in respect of insurance business in British India is permitted to sue in this country, notwithstanding anything to the contrary which the relative policy may contain. And it is further enacted that whenever the right thus conferred is exercised, questions of law arising in the proceedings are to be resolved in accordance with the law of India for the time being. In the following pages the writer aims at presenting in a readable form some statement of the law which is thus expressly attracted, while, at the same time, indicating the extent to which that law differs from the law of England.

Like all other commercial undertakings, the business of insurance is protected by the law of contract. In British India the law of contract remains to a considerable degree uncodified. It so happens, moreover, that the law relating to insurance lies largely outside what has been enacted by the Indian Contract Act of 1872. The law merchant, a body of personal law in many respects peculiar to India, that country's own law of property and of succession, are among the factors which in varying degree have exercised an authentic influence. Contracts of insurance made in India and designed to cover losses occasioned by dishonest dealings with property, have in the past attracted the English law of crime. That represents a condition of things the inconvenience of which is likely now to be felt; and a reform in the direction of attracting the criminal law of India may safely be envisaged. Novelty, and an increasing efficiency, in methods of transport are every day creating new juridical problems which it would be unwise to disregard.

By the form in which the study of the relative law is presented in the short treatise which follows an effort has been made to be of use to the individual student in focussing his attention upon whatever branch of insurance business is of special interest to him, without, as it is hoped, permitting him to lose sight of that jurisprudential background without which any picture he forms must inevitably mislead. Obviously, such treatment involves some repetition. The exigencies of space, however, have largely curtailed re-statement; wherefore cross-references to earlier chapters have been freely provided.

While cherishing the wish that the book may be found of aid to those many commercial interests, as well foreign as indigenous, which the law of the land is framed to subserve even where it seeks to control, there is the larger hope of being useful to the Indian student and to the Indian practitioner. The author is indeed highly conscious of the many difficulties which confront such readers in their study of our law. After all, that law is the creature of an historical development foreign to them, and is cast in an alien language. It is the recognition of the kind of obstacle which so often lies in their path that accounts for much of the substance as well as for the form of many of the footnotes; and to it is to be ascribed the inclusion in Chapter IV of much matter explanatory not only of shipping, but of nautical, terms with which but few Indian

students can be expected to be familiar. It is hoped in this way to make the case-law relating to maritime adventures and to the contracts of insurance which subserve those adventures more intelligible to the average reader.

References to reported decisions cannot, in a work of the present scale, be as full as in text-books of more ample scope and design; but what are believed to be the essential authorities for the various propositions stated have been carefully collected and are, it is thought, up to date. The decision of the House of Lords in *Wooding v. Monmouthshire and South Wales Mutual Indemnity Society*, [1939] 4 All E.R. 570, has been included in the Table of Cases, but the report appeared too late for commentary in Chapter VIII. Much of its importance derives from the application made of section 7 of the (English) Workmen's Compensation Act, 1925. The House, however, discussed points of general interest, particularly as to the basic conception underlying a contract of insurance. In like circumstances the case of *Sadiq Ali v. Zahida Begam*, [1940] 10 Comp. Cas. (Ins.) 1, is omitted from the text, but included in the Table of Cases. There the Court held an assignment by way of gift of policy-moneys, to be realised in future, not to have the effect of making the gift itself *in futuro*. The assignment was complete so soon as the provisions of the Insurance Act, 1938, had been complied with. The Court further held the words "any law or custom" in section 38 (7) to be wide enough to include the Mahomedan law.

The list of those to whom the writer's thanks are due is a long one. At its head must stand the name of Mr. A. K. Bhattacharjee. From his suggestion touching a joint commentary on the Insurance Act, 1938, there finally emerged the idea of writing a short treatise on the larger theme. He gave much practical help in shaping the material which now forms part of Chapters IX, X and XI, and he gathered together numerous references to the Indian case-law. His efforts in the collection of such *data* were, later on, supplemented by the industry of Mr. Niranjana Banerjee. Mr. Jyoti Prakash Mitter cheerfully undertook whatever was asked of him: tasks which often involved him in the tedium of proof-reading. In the preparation of the Table of Cases Mr. Jodh Singh Toragi has been of the greatest assistance, and Mr. E. B. H. Lord has given systematic help in correcting the proofs.

It is a pleasure to record the courtesies extended to the author by several correspondents from whom information had been sought, and in this connection to express his thanks to the respective Secretaries of the Madras Marine Insurance Association and the Burmah Chamber of Commerce; to the Inspector General of Police, Punjab, the Commissioner of Police, Madras, and to the Chief Officer of the Bombay Fire Brigade. To the Triton Insurance Co., Ltd., the North British and Mercantile Insurance Co., Ltd., the Phoenix Assurance Co., Ltd., and the Ocean Accident and Guarantee Corporation Limited, he is under obligations which he gladly acknowledges. From E. F. Menzies, Esqr., F. Carl Seager, Esqr., and Stanley Bullock, Esqr., he has received ungrudging assistance including appreciative criticism and a number of suggestions valuable for the commercial experience which informed them. These public acknowledgments of aid would be incomplete without a reference to the good nature of A. P. Herbert, Esqr., M.P., the Senior Burgess for the University of Oxford, who has permitted a quotation from one of the most delightful of his *Misleading Cases*.

Whether what emerges from the pages that follow is to prove worth the labour that went to the writing of them is a question impossible for their author to answer. He can but say with a certain writer of olden time "*nec satis scio, nec, si sciam, dicere ausim*".

N. BARWELL.

TEMPLE CHAMBERS,  
CALCUTTA.

17th February, 1940.



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## CHAPTER I

### INTRODUCTORY

The Notion of Insurance—Origins—Indirect and Direct Insurance—Marine Insurance in London—Other Risks—The rise of Lloyd's—an Early Policy respecting a Voyage from India—The Modern Policy—Principles borrowed from Marine Insurance—Progress of Insurance in other directions—*e.g.* Risks incidental to Railway travelling—Employers' liability—Dependence of Life Insurance business on statistical data—(Growth of public confidence—New methods of transport—War and Civil Disturbance—Beginnings of Insurance in India—Indigenous Undertakings—Contrasts—The changing scene—Some comparisons—The horizon—Recent Indian legislation.

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The notion of Insurance, as that word is now-a-days used among commercial people, was introduced into India but little more than a century ago. It is of European origin. But, though commercial traffic between the Mediterranean peoples of Europe and the westernmost races of India is traceable more than a thousand years ago, it remained for the English to bring it to these shores in the early part of the 19th century.

To "ensure", "insure", or "assure oneself of", something, imports the idea of "making safe". Men of commerce today are thinking along the same lines when they speak of "security". It is not surprising, therefore, to find, as history tells us is the case, that insurance developed out of money-lending. For nowhere in man's trafficking does he show himself more anxious to achieve at least a sense of security than when he is minded to put out his money at interest.

**Origins.**—The history of commerce is very largely the history of maritime enterprise, and thus it is that so much of it is bound up with the history of the great harbours or ports of the world; for, as the name "port" itself sufficiently evidences, these are the "gates" through which international trade ebbs and flows. If Athens had not been a port as well as a city-state the cultural development not only of the rest of Europe but of much that is now styled Asia might well have followed very different lines, and might as well have been retarded by many centuries. To estimate what the modern world owes to the "Hellenes"—a nicer word, surely, than "Greeks"—is a task that may never be finished. It is sufficient for our modest purposes to point out that not the least of the contributions which that gifted people made towards the commercial development of Europe was in the direction of maritime enterprise, supported as that was by a courageous recognition of the power and importance of credit. That sensitive society which gave to Athenian life so many of its special graces was acutely conscious of the difference between mere usury and the sound and judicious lending of money. Then, as now, he who did no more than meet the borrower for his own gain even if that were to spell the other's ruin, was everywhere an object of hatred and contempt; while the monied man who by the

form and manner in which he invested his wealth stimulated trade and industry and made possible many a commercial venture which otherwise might never have been undertaken, found himself regarded not only as a worthy citizen but as a member of a recognized and honourable profession. In a word, he was a Banker, a *ραπεζίτης*<sup>1</sup>.

The wisdom of Athens in her prime is well exemplified in her treatment of the foreigner within her gates. Whilst fully conscious of the inner origin of her own culture, and aware that none but herself could safely nurture the fruit of her womb, she was not afraid of the talented alien. On the contrary, the numerous opportunities for amassing wealth which were left open to him in return for his labour, exhibit the Athenian people as keenly alive to his value, and as realizing that if it is to make full use of him, the State must itself use him well. By the 5th century before Christ the pursuit of this policy had brought into being a permanent settlement of foreigners who, free to make money as they would upon Athenian soil, tended more and more to spend it there. Such a settler, to whom the name *μέτοικος*<sup>2</sup> had been given, might enter into every trade and calling. In time these foreign settlers were able to extend their interests to banking and to shipping. And nowhere did they show themselves more successful than in their use of capital to finance maritime enterprise. In this manner they became a community, bound together less by original racial ties than by close financial interests. They were seen to be in a flourishing condition so early as the 5th century. By that time also a recognizable system of commercial law had been built up in Greece: one of its more important features being an insistence upon the written contract. A number of what we should now call "pleadings"—in those days spoken,—have survived; and from them may be obtained a remarkably clear view of Greek industrial and commercial life. In the succeeding century in Greece commercial causes had attained special recognition and a machinery designed to provide for their expeditious disposal: the rule being that Judgment should be pronounced within one month of what we should today call the Statement of Claim or Plaintiff.

**Indirect Insurance.**—In the records of such litigation and in other sources of information, we meet with numerous references to a class of commercial transaction which has some of the characteristics of banking and some which, today, are associated with the business of insurance. For example, a merchant shipper desirous of financing his enterprise borrows money at interest upon the security of both hull and cargo. By the terms of the bond he is discharged from all liability for the debt should the ship be lost; but if she arrive at the end of the voyage for which the loan has been taken, the principal sum together with interest at the agreed rate become immediately due and payable.

Transactions of such a nature were of everyday occurrence as Athenian overseas trade advanced. In theory, the creditor was considered to run more risk than his debtor, because, apart from genuine perils of the sea, fraudulent devices were numerous and often proved incapable of exposure. In consequence, the rate of interest was high. Upon a voyage, palpably of only a few days' duration, 12½% was not

<sup>1</sup> Pronounce *trapēzites*. It means, literally, one who sits at a table. Compare the English word Banker, deriving from the late Latin word *bancus* meaning, in this connection, a "shelf".

<sup>2</sup> Pronounce *metoikos*, meaning "one who takes his home with him," and so "settles" (in the modern sense) in a land other than the land of his birth.

unusual. To cover a short voyage, including a return by the same route, 30% was commonly paid, even in times of peace.

The significance of such transactions for us today is that they establish the earliest of a type of commercial investment in which the concept of insurance had a place; and further that in them we descry, if not the origin, at any rate the earliest form of the *Bottomry*, or *Respondentia*, Bond.

These early Greek transactions, however, are in reality in the nature of indirect insurance. And many a long day was to pass before the direct insurance of maritime risks became a common feature of commercial life even among the more enterprising of the sea-faring peoples of Europe.

**Beginnings of Direct Insurance.**—The immediate successors of Greek civilization proved less interested in, because less dependent geographically upon sea-power, as such. Rome moved deliberately across *terra firma* in preference to the great waters. And so it was the maritime interests of more Northern races which ultimately disclosed the need of direct insurance against the perils of the sea. Thus we find such insurance a prominent feature of the commercial activities associated with the Low Countries in the 14th century. Thereafter we find marine insurance as subject of an ordinance in Barcelona somewhere about the first quarter of the 15th century. Some writers consider that direct as well as indirect insurance was in use in Italy somewhat earlier. There is an ordinance published in Florence in the first quarter of the next century and the topic of insurance finds a place in the maritime laws of Louis XIV of France.

**Marine Insurance in London.**—But by then, the city and port of London had already become a recognized centre where such risks could be covered. Indeed so numerous had become disputes there, arising out of contracts of insurance against maritime risks, that in the 43rd year of the reign of Elizabeth we find a Statute passed having for its object the creation of a special tribunal for disposing of them. In addressing Queen Elizabeth's first Parliament, Sir Nicholas Bacon is seen to use a figure already "understood of the people" when he puts the question: "Doth not a wise merchant in every adventure of danger give part to have the rest assured?"

**Other risks.**—The 17th century in England saw the beginnings of a recognizable system of fire insurance, to which the terrible domestic disasters inflicted by the Great Fire of London in the middle of that century had given an immediate impetus.

During the same period commercial insurance of many kinds gradually but steadily developed. Life insurance, however, really dates from the next century, its speedier development being for a great many years retarded,—as it is in some measure retarded in India today—by lack of reliable statistical *data* without which the actuary cannot safely function. It was not till 1713 that the *Ars Conjectandi* of Bernoulli had appeared. Thus, the oft-quoted instance of the suit upon a policy of insurance granted upon the life of one William Gibbons in which some 16 different underwriters had joined in 1583, marks but an experiment in that kind of insurance: of which, indeed, there were to be but few other examples in England for more than a hundred years.

Until the 16th century was far advanced the business of insurance was almost entirely confined to the private individual. The private

insurer, like the private banker, was a specialist, whose success was entirely dependent upon his personal skill and the extent of his private fortune. Each of such persons was in competition with the rest. Thus, as has been well said, the insured person in those days "lacked the benefit of large aggregations of capital to make his contract safe; while the insurer, who took but one or a few risks, was without the security of large averages and might be crushed by an exceptional loss".

**The rise of Lloyd's.**—In the domain of marine insurance in London, which to a large extent set both the pattern as well as the pace of commercial insurance generally, the beginning of some mutual co-operation on the part of insurers (already styling themselves "underwriters" from the position of their signature on the relative document) had distinctly emerged by the dawn of the 17th century. The risks attending a maritime enterprise were shared between the persons who thus "subscribed" their names on the contract, but to the extent only of the amount specifically assumed by each individual insurer. The liability was thus not joint, but strictly several. The fact that during the last years of the 17th century, gentlemen so engaged, and holding themselves out as professional insurers, were *habitués* of Master Edward Lloyd's Coffee House in the City of London, and that the worthy proprietor thereof was also content to allow commercial and sea-faring gentlemen doing business with them to transact that business over the refreshment table, gave to the market itself the name of Lloyd's. But the proprietor, whose name was thus to be handed down to posterity, had long been dead before his original customers' successors had made any attempt to incorporate themselves, or even to assume a common responsibility in matters of insurance.

Although with the early underwriters associated with the name of Lloyd's, the business of marine insurance was not only their constant, but their principal, commercial interest, they were not averse from entertaining other kinds of risk. Many of such so-called insurances were little if at all distinguishable from mere wagers; and as it happens there was nothing in which the underwriters of those days thus speculated in,—outside of course marine insurance—which was destined to have any effect upon the course of commercial history.

**An Early Policy respecting a Voyage from India.**—It will be a matter of interest, perhaps to our Indian readers that the earliest known policy in English (dated 1555) is expressed as on the good ship *Sancta Crux* "from any port of the isles of India of Calicut unto Lixborne". This policy is remarkably brief: the obligation of the single underwriter being thus set forth:—"We will that this insurance shall be so strong and good as the most ample writing of assurans which is used to be maid in the strete of London or in the burse of Andwerp or in any other form that shoulde have more force". In truth the utility of the London form of contract was even then so generally realized that the Antwerp policies usually contained a provision that they should in all things be the same as policies made in Lombard Street within the city of London. Similarly, Italian policies—as witness two made during the same period upon a ship named as the "*Santa Maria*"—expressly refer to the usage and custom of "*Questa strada Lombarda di Londra*" as the standard.<sup>1</sup>

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<sup>1</sup> The word "policy" is commonly derived from the Italian "*Polizza*" which in turn descends, it is said, from a late Latin word meaning an "account" or

In this manner some of the difficulties which in after years developed, the discussion of which belongs to the special subject of the conflict of Laws, were for the time being and in large measure avoided.

The next landmark perhaps is a policy dated 1613 covering a cargo upon the good ship "Tiger" on a voyage from London to "Zante, Petrasse and Saphalonia". The statement of the perils insured against is remarkably close to the form which has come down to us as having been adopted by Lloyds in 1779 and which was expressly included in the Sea Insurance Stamp Act of 1795. From this form has descended practically every British and American marine policy in use today.

**The Modern Policy of Marine Insurance.**—"Policies of marine insurance" writes Sir Frederick Pollock "are to this day made in a form which on the face of it is clumsy, imperfect and obscure. But the effect of every clause and almost every word has been settled by a series of decisions, and the common form really implies a whole body of Judicial rules originating"—here citing Brett, L.J., as he then was, in *Lohre v. Aitchison*, [1878] 3 Q.B.D. 558, 562—"either in decisions of the courts upon the construction of or on the mode of applying the policy, or in customs proved before the courts so clearly or so often as to have been long recognized by the courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract".

Many have been the attempts since then to simplify the form of policy so long associated with Lloyd's, or at any rate in some measure to remove from it the obscurity resulting from archaic phraseology by the interpolation of more modern business expressions. None have been altogether successful.

**Principles borrowed from Marine Insurance.**—As we have already seen, the earliest form in which insurance took shape was in policies covering perils of the sea. Not unnaturally the principles it developed continued in many instances to govern other kinds of insurance as the same came gradually into being. Indeed, even today, when for the solution of a problem arising in another class of case, no other principles are available, one may safely borrow from the law of marine insurance. (See the observations of Roche, J. in *Williams v. Baltic Insurance Association of London, Ltd.*, [1924] 2 K.B. 282.)

Inasmuch as it was the English who brought modern insurance to the shores of India, its development upon the continent of Europe will have for the Indians less historical interest as lacking an historical connection with this country.

**Progress in other directions.**—The 17th century in England saw the development of insurance along two distinct lines of progress. In rivalry with the private insurer there grew up mutual aid societies of which the Friendly Society was the first to gain prominence. The latter was an organization founded in 1684 for the purpose of providing

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"memorandum book". This word is *polyptychus*: itself little more than a transliteration of the Greek word *πολύπτυκος*—(pronounce "*poluptukos*"—meaning "with many folds". The word is used by Homer as an epithet descriptive of Mount Olympus: as one might say "many creased" Olympus).

insurance for its own members. Its funds consisted of their entrance-fees and a cash deposit from each, repayable when the particular membership for any reason determined.

The statistical *data* then available as to the destruction of house property by fire led to the conclusion that 1 in 200 houses was so destroyed every 15 years. All the Society's calculations were based on this assumption. It became so popular, and was considered so useful and reliable, that it appeared to its members to be worthwhile opposing Letters Patent which, two years later, an institution styling itself "The Fire Office at the backside of the Royal Exchange" was attempting to get. But the subsequent litigation between these two rivals is of no more than domestic interest today.

Within the first decade of the succeeding century many insurance organizations had sprung into being. The Sun Fire Office dates from 1706, the Union Fire Office from 1714 and the Westminster from 1717. By this date, both personal and real property of all kinds had become insurable against fire; and in the principal provincial centres these early undertakings soon gained as much credit as they had won in the city and suburbs of London. In 1720 Parliament approved the grant of charters to the Royal Exchange and the London Assurance Company. In their inception these corporations confined their operations to marine insurance; but little more than a year later were permitted to entertain fire insurance business as well.

**Risks incidental to Railway travelling.**—During the 19th century a great number of other risks to which man and his many activities are susceptible passed into the category of practical business. Accidents to railway travellers were among the first to be so accepted. Indeed, so popular and consequently so profitable did insurance against accidents of this kind become, that policies in the form of tickets purchasable at Railway booking offices were common before the end of the century. Similar contractual obligations could be made by the simple expedient of filling up a form which might be found printed in more than one type of diary purchasable at most book-sellers and from railway book-stalls.

**Employers' liability.**—During the late seventies of last century the celebrated Employers' Liability Act was passed. The importance of seeking some form of cover for the risks thus imposed upon employers of labour was immediately perceived, and almost as immediately provided for by the floating of the Employers' Liability Assurance Corporation of London in 1880.

**Life Insurance and Statistical data.**—Mention has already been made of the relatively late appearance of what is now-a-days styled—rather misleadingly—"Life Insurance". In fact, the object of transactions falling within the category of things so described insure neither a man's life nor his death; nor do they partake of the nature of an indemnity to him; for he *does* not survive to use the fruits of his *premium*. It is thus more correct to say that something is "assured" rather than "insured" and that the something thus made more "certain" or "safe" is the payment of a particular sum of money, either to the assured's nominee or to his estate at his death.

As already pointed out, the development of this class of business was hindered by the lack of any reliable *data* upon which actuarial calculation could be based. The reader was reminded that the *Ars Conjectandi* of Bernoulli had made its first appearance in 1713. A little later de

Parelieux, a French mathematician, had arrived at certain conclusions which he had arranged in tabular form and included in his *Essai sur les probabilités de la durée de la vie humaine* which subsequent students have continued to regard as exhibiting a remarkable approximation to modern results. Much about the same time had appeared in England the *Cambridge Tables*. Rather earlier, one John Gaunt, a London tradesman, had published a table wherein he claimed to exhibit "one hundred quick conceptions: how many die within 6 years; how many the next decade, and, so for every decade till 76".

But a real beginning had been made so far back as 1693 by no less a person than Edmund Halley, the celebrated astronomer, the friend and associate of Isaac Newton. In the year named Halley had finished and presented to the Royal Society a paper having for its subject "the degrees of mortality of mankind", and had largely relied for his statistical *data* upon certain remarkable figures discovered in the Municipal archives of Breslau in Germany where some 6,200 births and 5,900 deaths had been recorded over a period of 5 years. From these and certain other statistics, Halley compiled a Table of Mortality in a novel form, and one which has remained substantially unaltered till the present day.

**Growth of public confidence.**—As reliable statistical *data* became more general and more accessible to the student of commercial affairs, it became every day easier to persuade the public at large of the immense advantages in every walk of life which insurance along sound lines could offer. When the public realized that the offers which the insurance world was thus making as covering so many and such diverse risks, were not based upon a mere gamble with Fate, but upon a recognizable theory of probabilities, suspicion was displaced by confidence and a general eagerness was exhibited to take advantage of every system which insurance companies were advertising. Professional men, for example, found it for the first time possible to protect themselves against serious loss of earnings as a result of illness.

**New methods of Transport.**—The supplanting of relatively slow-moving horse-drawn, by mechanical, transport, not only in the towns, but for long distances over the old turnpike roads—roads which had for nearly a century been themselves supplanted for through traffic by the great Railway undertakings—had introduced a new form of risk against which it was imperative that travellers should provide. Such risks, by the first decade of the 20th century, had enormously multiplied and prominent among them was the high incidence of claims by third parties.

To the present day student of Economics few modern movements can seem more surprising than the rapidity with which insurance companies are seen to have adjusted themselves to all these new-found needs of the travelling public.

Three further types of risk were to be brought most prominently before the modern world during the succeeding 20 years.

Travelling by air over land and ocean at relatively great altitudes, and at hitherto undreamt of speeds, passed swiftly from the realm of mere adventure to that of ordinary everyday experience. With it the accumulation of necessary statistical *data* was able quite easily to keep pace. And it is no more difficult in civilized countries today to insure against the risks attendant upon travel by air than it is against those incidental to any other means of transport.

**War and Civil Disturbance.**—Within the same period the modern world was introduced to the deliberate destruction of every form of

tangible property by so-called acts of war, and upon a scale wholly unparalleled in previous history.

The measure of mere brute force thus let loose was not appreciated at the time nor for many years afterwards. Yet few are the countries which, since the Russian Revolution, have not been brought face to face with the dangers to life and property which civil disturbances on any scale can now-a-days create.

The passing from a state of peace to one of war may be brought home to any nation within a few minutes by the aerial bombardment of its open towns and by the rapid asphyxiation of many thousands of their civilian inhabitants.

Yet, in countries where modern measures of protection against these events have been undertaken and made generally known to the public, the degree of risk can in large measure be foreseen and estimated. And here, once more, modern insurance is seen to have come forward to help in maintaining the national credit, realizing that such credit, whether at home or abroad, is intimately and fundamentally dependent upon national courage and national foresight.

**Beginnings of Insurance in India.**—Having thus attempted to trace, though in no more than in the broadest outline, the progress of commercial and private insurance in the British Isles, we turn to that part of the history of British insurance which concerns the great peninsula of India, where, as we shall see, the value of insurance was early perceived by the more progressive elements among the indigenous population, and where insurance, in the modern sense, has now come plainly into its own as a permanent factor in the economic life of the people.

As in England so in India, mutual aid associations and those formed to amass and to operate Provident Funds appeared fairly early and still survive as rivals of the more purely commercial types of enterprise. So, too, the private insurer or mere partnership firm has been obliged to give way before the joint stock company.

Of the early pioneers from overseas the following claim precedence on the basis of seniority among the non-Indian undertakings still in active business today.

The pride of place in this list must be given to the *Sun Insurance* which was founded in 1710. Its Indian head-office is still in Calcutta the former capital of British India. Two other Insurance undertakings date from 1720, *The London Assurance* and the *Royal Exchange Assurance*. We then have in order of their foundation overseas the *Phoenix* (1782); *Norwich Union Fire Insurance Society* (1797); *North British and Mercantile Insurance Co.* (1800); *The Norwich Union Life Insurance Society* and the *Atlas Assurance Co.* (1808); *The Halifax Fire Insurance Co.*, constituted in Canada (1809); *The Fire Association of Philadelphia U.S.A.* (1820); *The Guardian Assurance Co.* (1821); *The Yorkshire Insurance Co.* and *Alliance Assurance Co.* (1824); the *Standard Life Assurance Co.* (1825); *L'Union Fire Accident and General Insurance Co., of Paris* (1828); *Assicurazioni Generali (General Insurance Co.) of Trieste and Venice* (1831); *The British American Assurance Co.*, constituted in Canada (1833); *The Union Insurance Society of Canton* constituted in Hongkong, China (1835); *The Liverpool and London and Globe Insurance Co.* (1836); *The Westchester Fire Insurance Co., U.S.A.* (1837); and the *Riunione Adriatica di Sicurtà of Trieste* (1838).

Of the foregoing insurance undertakings, all of them at least a hundred years and some of them more than two hundred years old,

only a very few began business in India before the dawn of the present century. The first of them to appear was the *Standard* in 1846. The *North British and Mercantile* was the next on the scene (in 1864). A year later, *The Royal* commenced business in India. That very ancient undertaking, the *Phoenix*, was not seen in India before 1870. In spite of the pioneer work of the *North British and Mercantile*, the *Scottish Union and National* did not venture here till 1881. The *Royal Exchange* delayed its arrival till 1892. In 1895 the first of the colonial insurance organizations appeared, namely the *Sun Life of Canada*.

**Indigenous Insurance Undertakings.**—Meanwhile, however, insurance in India had come into existence independently. The *Madras Equitable* was established as far back as 1829. Lamentably it went into liquidation in 1921 thus just failing to complete its centenary. From the very start indigenous insurance enterprise followed the two distinct channels of which mention has already been made; that is to say, the Mutual Associations once early established continued to maintain their popularity, while commercial insurance was gradually being built up in competition with the foreign-controlled interest. The following list gives the date of establishment of Indian-controlled undertakings which are still in business today and which came into existence before the end of the 19th century :—

- 1847. *Christian Mutual Insurance Co., Lahore.* (Life).
- 1849. *Tinnevely Diocesan Council Widows' Fund, Madras, Palamcota.* (Life).
- 1850. *Triton Insurance Co., Calcutta.* (Fire, Marine and Accident).
- 1871. *Bombay Mutual Life Assurance Society, Bombay.* (Life).
- 1874. *Oriental Government Security Life Assurance Co., Bombay.* (Life).
- 1883. *Indian Ordnance Mutual Assurance Fund, Kirkee.* (Life).
- 1884. *Indian Christian Provident Fund, Madras.* (Life).
- 1885. *Associaçao Goana de Mutuo Auxilio, Bombay.* (Life).
- 1888. *B.B. & C.I. Railway Zoroastrian Association (Death Benefit Fund), Bombay.* (Life).
- 1888. *Mangalore Roman Catholic Provident Fund, Mangalore.* (Life).
- 1889. *Bombay Zoroastrian Mutual Death Benefit Fund, Bombay.* (Life).
- 1891. *Guzrat Zoroastrian Mutual Death Benefit Fund, Nanpura Surat.* (Life).
- 1891. *The Hindu Mutual Life Assurance, Calcutta.* (Life)
- 1892. *Indian Assurance Co., Karachi.* (Life).
- 1893. *The Punjab Mutual Hindu Family Relief Fund, Lahore.* (Life).
- 1894. *Sind Hindu Provident Funds Society, Hyderabad. Sind.* (Life and Marriage).
- 1896. *The Bharat Insurance Co., Lahore.* (Life and Fidelity Guarantee).
- 1897. *The Empire of India Life Assurance Co., Bombay.* (Life and Fidelity Guarantee).
- 1899. *The Mutual Help Association, Simla.* (Life).

**Contrasts.**—Of the insurance companies and societies enumerated above, only the *Triton* held itself out as a Marine Insurer. Analysing the above Table of 19th century Indian undertakings, we find that Life Insurance is holding the predominant place. In fact only one company (the *Triton*, again) offered to insure against fire as well as marine risks.

In rather strong contrast to the above condition of things is the development of business undertaken by non-Indian insurance interests during the same and the succeeding century in India.

Steady development in several fields marked the history of the following undertakings during the period named: *The Atlas, Guardian, Liverpool and London and Globe Insurance Co., Marine Insurance Co., North British, Norwich, Phoenix, Royal Exchange, Royal Insurance, Scottish Union, Standard Marine, State Assurance, Sun Insurance and the Yorkshire Insurance.*

In the business of marine insurance during all this time in India, Calcutta figures as the focal point with the head offices of one Indian and 13 non-Indian marine insurers. At Bombay were the head offices for India of *The Standard* and *The Yorkshire*. Madras and Karachi appear much later. The non-Indian interests trading in India during the century under review are found transacting considerable business in fire and accident also. As to life assurance, competition with Indian interests seems certainly to have been felt during the last quarter of the 19th century. But, in any case, the foreign insurance companies tended in this class of business to act with extreme caution. Nor is such caution unnatural in the circumstances, when it is remembered how difficult it was to obtain reliable data as to average expectancy of life among the various Indian people, and the large sections of the population which were relatively inaccessible either for agency purposes or for inspection after claims made.

An even greater change has come over insurance business in India during the present century and business, whether indigenous or foreign, has startlingly increased.

By 1935 no fewer than 383 insurance companies and societies were doing regular business in India, of whom 231 were Indian and 152 non-Indian. The origin of the non-Indian concerns may be thus classified: 69 were constituted in the United Kingdom and 29 in other British Dependencies. Of the remaining non-Indian companies 16 were constituted in U.S.A.; 9 in Japan; 7 in Holland or its dependency of Java; 6 in Switzerland; 5 in Germany; 3 in France and 1 in Austria. Of those constituted in the United Kingdom the *doyen*, as mentioned above, is the *Sun*. The earliest Canadian insurance company *The British America Assurance*, has also been referred to. Of those constituted in Australasia (which includes New Zealand) the seniormost is the *National Mutual Life Association of Australasia* founded in 1869, whose head office in India is at Bombay. Of the 3 companies constituted in the Straits Settlements now trading here the oldest is the *Great Eastern Life Assurance Co.*, founded in 1908 with its head office for India in Calcutta. Bombay houses the head office in India of the *African Guarantee and Indemnity Company* established in 1911. Mention has already been made of the more-than-a-century old *Hartford Fire Insurance Company* which is the seniormost of the concerns constituted in U.S.A. Its head office for India is in Calcutta. The eldest of the Japanese companies doing business here is the *Tokyo Marine and Fire Insurance* which was founded in 1879. Its Indian head office is in Calcutta. The seniormost Dutch-controlled insurance company trading in India is the *Batavia Sea and Fire Insurance*, with its head office for India in Calcutta. The Swiss have here two companies dating from 1851, namely the *Baloise Fire Insurance* and the *Swiss National Insurance*. Both have their Indian headquarters at Bombay. Germany's oldest Insurance Company in India is the *National General Insurance* founded in 1845. Germany is the only foreign country which has placed the headquarters of an insurance concern at Delhi, the new capital of India. Reference is of course made to the *Allianz und Stuttgarter*, founded in 1889.

The oldest French company in India (L'Union) has already been mentioned. Its headquarters is in Bombay. Both the Italian insurance companies now trading in India are centenarians and both have been referred to already. The "*General Insurance*" has its headquarters in Calcutta, the other Italian concern in Bombay. Austria's one insurance company doing business out here is the *Danube General Insurance Company* founded in 1867. Its head office for India is in Bombay.

**The Changing Scene.**—Turning to purely Indian-controlled business, we find equally remarkable changes. While it is true that of the 231 Indian concerns doing business in 1935, 201 are doing Life business, no less than 15 companies according to the available statistics are offering insurance against marine risks. Of the port towns, Bombay now heads the list as furnishing the headquarters of nine of such undertakings; Calcutta comes second with five. Madras has still but one Marine Insurance Company. Immediately after the great war, namely in 1919, five such companies were established in Bombay. The remaining four are of quite recent origin, having been established between the years 1928 and 1935.

For some years past the Government of India has been issuing a special publication known as the Indian Insurance Year Book, as also occasional supplements to it. Recently the well-known commercial Calcutta Weekly "*Capital*" published some three articles on the topic of Insurance in India, containing, amongst other things, a number of useful summaries of figures extracted from the Indian Insurance Year Books of 1930-1935. The authors of this present treatise gratefully acknowledge their indebtedness to the above-mentioned publications.

It will be noticed at once that the preponderating business continues to be in the nature of Life Assurance in all its forms, in which has to be included endowment policies and the provision of annuities. A study of the statistical publications to which we have referred brings certain circumstances into high relief; the first and most obvious of which is the relatively large number of concerns offering facilities of the last-named nature which are the creations of yesterday.

**Some Financial Comparisons.**—The author of the articles which appeared in "*Capital*" in 1937 compared the published figures of new Life Insurance business effected in India by Indian concerns between 1929 and 1935. Such new business in 1929 had shown an increase over those of 1928, but there was a falling off the next year. The position, however, was regained in 1931, when the value of the new policies effected stood at Rs.17,75,59,000 whereafter it steadily rose year by year till it stood at Rs.32,55,36,000 in 1935—a rise of about 80%.

Of the last-named total something over a crore represented policies effected outside India. The primary significance of these figures indicates firstly that the utility of Life Assurance has gained a real hold upon the public mind,—and this is further borne out by the fact that the non-Indian Companies have also been doing more business—and, secondly, that Indian society has come more and more to place reliance upon Indian-controlled insurance companies. This is evident from the fact that whereas the sums assured with the non-Indian companies in 1929 were Rs.12,22,14,000; the corresponding figure for 1935 was Rs.11,62,20,000. To compare the non-Indian with Indian company figures, one must deduct policies effected outside India, if one has to appreciate to the full how the Indian public is reacting to purely Indian life-insurance propositions. Deducting these the outside insurance

figures of Indian companies, we find the value of the policies effected in India in 1929 to have amounted to Rs.16,39,17,000. By 1935, this figure had reached Rs.31,31,40,000.

To determine how far so much public trust in Indian companies is well placed is no part of our task. Many Indian insurance companies are undoubtedly well-managed and shareholders are everyday evincing a keener and more intelligent interest in the affairs of companies they have invested in. There continues, however, to be evidence that many concerns have started operations with too little ready capital; a state of things which the most recent legislation, as we shall see hereafter, has been at pains to prevent in future. Upon this topic the student will find much interesting information especially concerning the ratios of paid-up to subscribed and nominal capital from pages 91 to 96 of the Supplement to the Insurance Year Book of 1935. The figures there exhibited are for the decade 1926 to 1935. From those pages the dividends paid over the same period may also be extracted.

Turning to modern figures relating to insurance other than Life Assurance and Marriage businesses, we find that between 1928 and 1934 the volume of business has varied between 2½ and 3 crores counting Indian and non-Indian concerns together. The total of such business in 1928 was Rs.2,54,76,000. In 1934 it was 2,47,21,000. The peak year in that period was 1929, when the total rose to Rs.2,98,95,000. The division of such business between Indian and non-Indian companies over that period varied. In 1928 it was as 11·37% to 88·63%; in 1934 it was 21·92% to 78·08% for Fire Insurance business. In Marine Insurance, Indian companies in 1928 had 19·82% to the non-Indians 80·18%. In 1934 the corresponding figures are 16·67% to 83·33%. The remaining figures are lumped together, namely for accident and Miscellaneous Insurance including Workmen's Compensation, Motor Vehicles, and Fidelity Guarantees. The division in this large miscellaneous class between Indian and non-Indian concerns hardly varied during the same period. In 1928 Indian companies enjoyed 25·24% to the non-Indian companies 74·76%. In 1934, the corresponding figures were 25·21 and 74·79%; India's best year being in 1932 when her percentage was 26·13% to her rival's 73·87%.

**The horizon.**—While it is no part of our plan to forecast how or at what speed Indian insurance will develop, no study of the law relating to insurance in India could profitably proceed upon any other assumption than that insurance business of all kinds will inevitably increase. Accordingly, certain general reflections may perhaps be permitted us.

It would seem reasonable to suppose that without a merchant marine built and owned in India, no sensational expansion of Indian marine insurance is likely. On the other hand, the creation of a ship-building industry in the near future is no unlikely and certainly no impossible event. It may well be that the creation of a modern oil-propelled fishing fleet (which the Japanese have found not only so profitable in their homewaters, but which for commercial and perhaps for other reasons as well, they have found it possible to maintain in very distant seas) may make an early appearance as a contribution to a more modern outlook upon Indian commerce. Whilst it might seem at first sight that the consumption of fish is confined to the coastal, and particularly to the deltaic areas of North-Eastern India, there is every sign that a substantial proportion of the younger generation of Indians, particularly of the more educated classes of Northern India, are no longer limiting themselves to

an exclusively vegetarian diet. If the Indian peoples are to become meat-eaters on any large scale, it will only be at the expense of a vegetation which should it be devoured at ground level to an extent commensurate with any large demand for sheep and goats, could only end in imperilling the safety of immense tracts of arable land for reasons which American farmers have shown themselves too late in realizing. Fish do not thus compete with man's necessities; and it needs but the provision of a sufficiency of cold storage and cheap transport to make fish marketing in the interior not an idle dream but, in a commercial sense, a reality. The coast line of a large part of India is well adapted for trawling, the opportunities for canning fish, either afloat (as the Japanese now do when operating in more or less foreign waters) or ashore, stares any one in the face who will but regard the map of North-Eastern India with the eye of a modern Industrialist. The bye-products of such an industry are valuable oils and almost equally valuable manures. Nor should it be overlooked that the units of such fleets are convertible at short notice into mine-layers and mine-sweepers, and, as such, have played and will continue to play a most important rôle in the defence of a nation's harbours and of its coast line. The recently discovered mineral oil in Assam renders the fuelling of such ships a matter of ease. Every one of them could be built in India and manned by Indian crews. No doubt, for some little time to come, it may be necessary to import the internal combustion engines required.

While the establishment of such a new industry would naturally afford a stimulus to many others, some of which are in little more than an embryonic stage, nowhere will the repercussions be speedier or more intensely felt than in the Insurance world, whose sustained assistance would be essential to success.

There are, as certainly, other directions in which insurance as an aid to the economic improvement of the masses has a great future in this country.

Much of the ancient history of India is written in terms of Plague, Pestilence and Famine; of man's helplessness in face of those prodigious forces of nature which manifest themselves not only in the apparently irresistible movements of mighty rivers but by the inestimable competition of insect life on a scale not to be met with in the more temperate zones.

One must suppose, then, that a natural development of Indian Insurance might well lie in mitigating the economic effect upon human affairs of these competitive forces. The necessary *data* upon which to base reliable calculations (in some, at any rate, of the directions indicated) are certainly, if slowly, accumulating. And with a more intelligent grasp of the principles upon which such calculations are made, the part which scientific insurance can play in the direct reduction of poverty will become widely recognized amongst all classes of Indian Society.

**Recent Indian Legislation.**—Just prior to the Great European War of 1914-18 some attempt was made by domestic legislation in India to deal with the control of insurance undertakings. In England the statutes of 1870-72 relating to companies engaged in the business of insurance had been repealed by the Insurance Companies Act of 1909. Three years later the Indian Life Assurance Companies Act (VI of 1912) was passed following in large measure the model of the last-named English statute. Earlier in the same year the Provident Insurance Societies Act (V of 1912) had become law. Sixteen years later was

passed the Indian Insurance Societies Act (XX of 1928). That Act effected certain amendments in Act VI of 1912 but was more largely concerned in providing machinery "for the collection of statistical information as to classes of insurance business other than life insurance, carried on in India by external Companies".<sup>1</sup>

"In 1935 the Government of India decided to proceed with the reform of Insurance Law without waiting for the enactment of further legislation in England".<sup>2</sup>—which legislation had been expected ever since the Committee presided over by Mr. A. C. Clauson, K.C., had reported in 1927.

Accordingly the Government of India placed Mr. Susil C. Sen, M.Sc., B.L., an attorney of the High Court at Calcutta, upon special duty to report upon the revision of the law relating to insurance business in British India and to make recommendations for its reform. Mr. Sen furnished the Department of Industry and Commerce with his Report and recommendations in November of 1935; and thereafter the drafting of an appropriate bill went forward apace. By the end of 1937 the bill had passed both Houses of the Central Legislature and having been thereafter returned to the Assembly with certain amendments finally became law in the early part of the present year. In its progress through the central legislatures of the country the bill had been piloted by Sir Nripendra Nath Sircar (a former Advocate-General of Bengal, and then, the *Law Member of the Government of India*). Perhaps it would not have been easy to find two professional gentlemen better qualified by learning and practical experience for the respective tasks thus allotted them. Whatever amendments subsequent events may indicate as desirable, the debt owed to these two Bengalee lawyers by all the commercial interests affected by this legislation must surely become part of the history of modern India.

The scope of the intended legislation has been thus expressed in the Statement of Objects and Reasons which accompanied the original draft of the Bill.

"It provides *inter alia* for the following matters. It increases the supervision exercised over all concerns transacting insurance business of whatever kind in British India, whether these are indigenous concerns, or external companies represented in India by branches or agencies, and treats agents acting for Lloyds' underwriters on the same basis as such branches or agencies. Registration formerly unnecessary except for Provident Insurance Societies is *proposed* for general application, and the principle of exacting deposits, hitherto applied only to indigenous companies transacting life insurance business, has been similarly extended. The amount of the deposit has been increased with the object of more effectively discouraging the formation of companies inadequately financed, and where the business of life insurance is to be carried on, a minimum net sum of Rs.50,000 is required as working capital. Provision is made for full disclosure of the information required to ensure sound principles of finance and management. Powers to enforce punctual submission of returns and to ensure their accuracy, and additional powers of inspection of insurance companies are taken. External companies are required to keep in their principal offices in British India the accounts and other documents by which their returns concerning their business in India can be checked. Certain restrictions are imposed on the investment of the

<sup>1</sup> Insurance Act, 1938 (IV of 1938). *Statement of Objects and Reasons*.

<sup>2</sup> *Ibid.*

funds of insurance companies, and external concerns are required to keep a portion of their assets invested in Indian Government securities. The existing provisions of the law relating to winding up of insurance companies, and to the amalgamation and transfer of insurance business have been enlarged. Provisions have been inserted to regulate the assignment and transfer of policies of life insurance and the making of nominations. Power is given to companies to pay into court moneys due under a policy where there is difficulty in securing a proper discharge. It is proposed to prohibit the employment of Managing Agents in future, and to bring existing Managing Agencies to an early end. In order to secure fair treatment for Indian Insurance companies operating in foreign countries, power is taken to subject the nationals of a foreign country to any restrictions that are imposed in that country on Indian insurance concerns operating there. Certain proposals are put forward aimed at checking the practice of rebating and the payment of excessive commission. These include provision for the licensing of insurance agents. The administration of the Act will be carried out through the Superintendent of Insurance, who will normally be the Government Actuary. To him also is assigned the supervision of Provident Insurance Societies.

The provisions relating to Provident Insurance Societies subject these to much more effective supervision than has hitherto been exercised. The name adopted by any such society will indicate its status. Business on the dividing principle is prohibited so that societies dependent on this class of business will disappear. A minimum initial working capital is required, and the principle of deposits is applied. The rules of a society will disclose fuller information of the working of the society. All schemes of insurance operated by a society are to be subjected to actuarial examination so that unsound schemes may be eliminated, and periodical actuarial investigation must be made into the financial condition of the society. Proper books of account must be maintained, and the accounts must be audited. Separate classes of business must be brought separately to account, and a separate fund must be maintained in connection with a particular group of contingencies. Assets are further protected by a provision requiring the investment in trust securities of a certain percentage of the total assets. Increased powers of inspection and inquiry are taken. Other features of this Part are the application to policies issued by Provident Societies of the provisions governing transfer and assignment of life insurance policies and nominations. Liquidation procedure, formerly governed by rules made by the Local Government, is now to be provided for in the Act itself."

It will thus be observed that the Act is primarily an administrative measure, and that, with very few exceptions, the substantive as well as the adjectival law governing contracts of insurance and their enforcement in British India is left practically untouched.

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## CHAPTER II

# THE CONTRACT OF INSURANCE IN RELATION TO THE GENERAL LAW

The Indian Insurance Act 1938 not a code—Previous Acts repealed—Liabilities of an insurer, being a company, unaffected—Registered Trade Unions excluded from operation—Insurance Law a special branch of the general law of contract—The Act of 1938 and the *lex fori*—The Indian Contract Act not a code—How far affected by equitable doctrines—*uberrima fides*—Nature of a contract under the Act summarised—Parties and their competency—Capacity distinguished from Power or Authority—Corporations *aggregate* or *sole*—Infants—Lunatics—Women—Section 20 of the Indian Succession Act—Sections 5 and 6 of the (Indian) Married Women's Property Act—Disqualification by a Court of Wards—Lawful object and lawful consideration—Unlawful objects and unlawful consideration illustrated—Wagering—The *Consensus ad idem*—Coercion—Undue influence—Mistake—Misrepresentation—Warranties and conditions generally—Fraud—Questioning of Life Policies under Act of 1938—Effect of a policy of assurance upon the measure of damages in a suit under the Fatal Accidents Act—Sources and principles of Insurance Law in India.

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The Act of 1938, of which mention was made in the last Chapter, is expressed as a "Consolidating and Amending Act", and is shortly intitled "The Indian Insurance Act, 1938". It does not purport to be a code. By section 123 it repeals the Provident Insurance Societies Act (V of 1912), the Indian Life Assurance Companies Act (VI of 1912), and the Indian Insurance Companies Act (XX of 1928). It does not apply to any trade union registered under the Indian Trade Union Act (X of 1926); while section 117 provides that the liability of an insurer, being a company, to comply with the provisions of the Indian Companies Act, 1913, in matters not otherwise specifically provided for, shall remain unaffected.

**Insurance Law part of the General Law of Contract.**—The law of insurance is a special branch of the general law of contract. Thus, an arrangement between two or more persons which in its essence amounts to an insurance is a contract. Every such contract, therefore, save to the extent provided by any special legislation is to be read in the light of the general law of the land. This is the more important to remember firstly, because, as already observed, the Indian Insurance Act, 1938, does not purport to be a complete code of insurance law, and secondly, because section 46 of that Act expressly confers upon the holder of a policy of insurance issued by an insurer in respect of insurance business transacted in British India after the commencement of the Act "the right, notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto":—(1) to receive payment in British India of the sum secured; (2) to sue for relief in this country. And

it is further provided by the terms of the same section that if in the course of such litigation in British India any question of law should arise in connection with the policy, it shall be determined according to the law then in force in that country. In the language of lawyers the effect of these provisions is to lay down that in any judicial proceeding so instituted the contract shall be construed according to the *lex fori*.

**The Indian Contract Act.**—The general law of contract in India has itself been the subject of special enactment. In so saying reference is made to the Indian Contract Act (IX of 1872) whose preamble refers to the expediency of defining and amending "certain parts of the law relating to contracts". This Act, too, then, does not profess to provide a complete code. No doubt, "the Act, so far as it goes, is exhaustive and imperative". (*Mohori Bibee v. Dhurmodas Ghoshe*, [1903] L.R. 30 I.A. 114, 125; 30 Cal. 539, 548.) But it has been said that there is nothing to show that the legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts. (*Irrawaddy Flotilla Co. v. Bugwandas*, [1891] 18 I.A. 121; 18 Cal. 620, 628, 629 cited also in 56 I.A. at p. 178.)

Although the framers of the Indian Contract Act in the seventies of last century aimed at providing in concrete form so much of the doctrines of the English Common Law relating to contractual obligations as India had by then already assimilated or as were manifestly compatible with Indian conditions, they seem hardly to have sought to the same extent to embody in it all of those principles which Courts of Equity in England had increasingly applied to disputes arising *ex contractu*.

**Equitable doctrines applied.**—It is to be noted that what has sometimes been referred to as "the fusion" of law and equity, which was to be expressed a few years later in the English Judicature Acts, had not then taken place. But although no such terms as appear in section 25(11) of the English Judicature Act of 1873<sup>1</sup> have even now found a place in any Indian statute, the rule has been frequently stated to be that courts in India are to administer the law of the land according to "Justice, Equity and good Conscience".<sup>2</sup> In effect, therefore, equity was already regarded as an instrument of justice as powerful in India as ever it was in the land where it had been so deliberately and so consistently nurtured.

The extent to which English equitable doctrines largely reshaped the law of contract in England is more a matter of academic interest than of practical importance in India today. Yet, there are many circumstances in which it is useful to remember the equitable derivation of a rule. Of such,—for instance only—is the rule of evidence known as estoppel; such too is the power to decree the specific performance of certain contracts;<sup>3</sup> and such also is the principle whereby a contract may be held void for want of mutuality.

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<sup>1</sup> The sub-section is thus worded :—

"Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."

<sup>2</sup> *Eshan v. Sreenath*, 9 W.R. 230, 232.

<sup>3</sup> This jurisdiction, formerly exercised in England by the Court of Chancery, has been conferred on Courts in India by the Specific Relief Act (I of 1877), secs. 12-30.

In the course of time most of the principles upon which Courts of Equity acted in England have become part of the codified law of India. Of such is the rule of estoppel;<sup>1</sup> the prohibition against the adducing of evidence of some oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of any written contract;<sup>2</sup> the right to avoid a contract entered into without free consent;<sup>3</sup> and the cognate conditions under which a contract may be avoided upon the ground of undue influence.<sup>4</sup> And to the realm of equity belongs that doctrine, so important in its application to contracts of insurance, by which certain classes of contracts are required to be entered into with the utmost good faith by all the parties to them. Lawyers usually refer to this doctrine as that of *uberrima fides* which is the latin for "utmost faithfulness", in the sense of complete honesty. Insurance contracts are within this class. It is sometimes thought by laymen that such contracts are the only contracts to which the doctrine applies. But this is not the case. It applies not only to certain classes of contract, but to many relationships which are not, strictly speaking, contractual in character. Wherever the nature of the relationship imports of necessity a great degree of trust if what the relationship stands for is to be achieved, the doctrine of *uberrima fides* applies. The relationship of trustee with his *cestui que trust*, of solicitor and client, partner and partner, to a large extent in contracts of suretyship, and between an advocate pleading at the Bar and the Court, when moving an application *ex parte* (i.e., in the absence of the other party to the cause) are instances of the application of this equitable doctrine.

**The nature of a contract under the Act.**—On the lips of a layman, the words "contract" and "agreement" are often used as if they were interchangeable. But in contemplation of law, this is not so. True it is that all contracts are agreements; but all agreements are not contracts. To use language not too technical but sufficiently precise, perhaps, to convey the reality, a contract, it may be said, is a species of agreement whereby an obligation binding in law is at once created and defined as between the parties to it.

The essential elements of a contract may be thus broadly stated: (1) There must be in the minds of the parties an intention to create an obligation binding in law as distinct from a duty or promise binding according to some code of morals or of social custom. (2) The parties must possess a capacity to contract, admissible by the law. (3) The object or purpose of the contract must itself be lawful. (4) There must be sufficient "consideration" for it: meaning thereby that each of the parties must stand to gain a sufficient *quid pro quo*. For it is in that belief and to that end that each party enters into it at all. (5) There must be between them a *consensus ad idem*: which is to say that in regard to the terms of the contract the parties must mean the same thing in the same way. Otherwise they are not properly "drawn together". (6) And lastly, the consent of each party to the agreement must be freely given.

It is one of the merits of the Indian Contract Act that by defining a contract as "an agreement enforceable by law"<sup>5</sup> it is providing both a

<sup>1</sup> Sec. 115 of the Indian Evidence Act (I of 1872).

<sup>2</sup> Sec. 92

<sup>3</sup> Sec. 19 of the Indian Contract Act (IX of 1872).

<sup>4</sup> Sec. 19A

<sup>5</sup> Sec. 2 (A) " " " " "

popular and an exact definition, and one which reflects the old distinction between *contractus* and *pactum* which is to be found in the Roman law.

The conception of a contract which the framers of the Indian Act had sought to embody is an arrangement of mutual promises whereby the parties intend to create equally mutual legal obligations. The interpretative clauses are to be found in section 2 which speaks in clause (f) of "promises which form the consideration or part of the consideration for each other" as "reciprocal promises". And it lays down yet another important distinction. "An agreement", we read in clause (g) of the same section, "not enforceable by law is said to be void"; while, "an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract". The section concludes in clause (j) by stating that a contract which ceases to be enforceable by law becomes void when the condition of enforceability is no longer present.

As pointed out by many commentators section 2 though using definitive language is largely declaratory of the Indian substantive law of contract. Its language is to some extent unusual and represents a departure from what the original Law Commissioners of 1866 seem to have intended. English lawyers for the most part have spoken of "offers" and "acceptances" as forming the framework of a contract, and the doctrine of consideration as supporting that frame. But the supposed difficulties which at one time seemed to threaten the practical use of section 2 have proved in the end rather imaginary than real. An "offer" may be to do or to refrain from doing something. Such conduct is a promise in the classical sense of the word.

For all practical purposes "mutual promises", "offers" and "acceptances of offers" may be taken respectively as synonymous expressions. And it will be found that wherever what one party engages himself to do or not to do is made worthwhile for him by the action of the other or even by the conduct of some third person "at the desire" of the other party to the contract (be the act one of commission or omission) then there is sufficient "consideration" to support the contract.

Thus it is that the definition of "consideration" in clause (d) of the section enables a party to a contract to enforce the same in India in certain cases in which English law would regard that party as the recipient of a purely voluntary promise, and would refuse to him a right of action on the ground of a mere *nudum pactum*. (*Krishna Lal Sadhu v. Pramila Dasse*, 32 C.W.N. 634, 639.)

The judgment of Rankin C. J., in the case just cited goes on to point out that there is nothing in section 2 of the Indian Contract Act to encourage the idea that a contract can be enforced by a stranger to it. Indeed, the notion is rigidly excluded by the definition of "promisor" and "promisee", appearing in clause (c) of section 2. It is otherwise where a person has a beneficial interest in the subject of the contract and is able to show a trust in his favour recognisable in equity. (*Page v. Cox*, 10 Hare 163; 68 E.R. 882; *Nawab Khurja Mohamed Khan v. Nawab Husaini Begum*, 37 I.A. 152.)

So, while not always using the language either of Equity or of the Common Law, the framers of the Indian Contract Act have somehow contrived to arrive at much the same result.

**Parties and their competency.**—In the forefront of the general law of contract in India is the statutory provision dealing with the

competency of parties to contract at all. Section 11 of the Contract Act is in these words :—

“ Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

The word “ person ” under the general law includes, where the context allows or does not involve a repugnancy, the plural as well as the singular number, the female as well as the male sex. The word “ person ” (from the latin “ *persona* ”) may be used of a partnership between two or more individuals<sup>1</sup> as also of larger groups whose members have formed themselves into an association or society whether or not the same be incorporated as such. Of corporate bodies the most important today are those created by charter or by statute. Moreover, a corporation—which means something “embodied”—may be what lawyers call a corporation *aggregate* or a corporation *sole*; the latter phrase pointing rather to the office than to the incumbent of it (though each successive incumbent becomes for the time being the corporation): to an office, moreover, which descends by operation of law and to which are attached specific trusts or specific obligations or duties. Of corporations aggregate those known to commerce as Joint Stock Companies form the more prominent examples in the modern world.

*Prima facie*, every corporation, whether *aggregate* or *sole* has the capacity in law to enter into a contract; but the lay reader is warned against confusing the concept of “ capacity ”, in the sense in which that word is used in section 11 of the Indian Contract Act, with the juristic concepts of “ power ” or “ authority ”.

For it may happen that a *person* (in the wider sense) not incapacitated to contract, may yet be debarred from so doing either by reason of some positive prohibition binding in law, or for want of the necessary power or authority in the particular instance: *e.g.*, the limitations which may be imposed by a company's Memorandum or Articles; in another case by a partnership Deed or by the terms of such an instrument as a Power of Attorney. In the present chapter the subject of “ capacity ”, and not that of “ power ” or “ authority ”, is discussed. The latter topic properly belongs to the theme of *ultra vires*, and will be found so treated in a later chapter.

Competency to contract is, under the general law of India, in certain instances partly dependent upon the personal law<sup>2</sup> by which the individual is governed and partly upon the law of domicile.

**Infants.**—An infant domiciled in India is, as such, subject to the Indian Majority Act (IX of 1875) which by section 3 declares that every person so domiciled shall be deemed to have attained his majority when he shall have completed the age of 18 years and not before.

That Act, however, contemplates cases in which a person's majority may be delayed till he shall have attained to 21 years. Common instances

<sup>1</sup> The rights and liabilities attaching to partnership in India are now governed by the Indian Partnership Act (IX of 1932); those of Joint Stock Companies by the Indian Companies Act (VII of 1913) as amended to 1936.

<sup>2</sup> The famous Regulation of 1772 had laid down that in all suits regarding “ inheritance, succession, marriage, caste, and other religious usages and institutions the laws of the Koran with respect to Mohammedans, and those of the *Shastras* with respect to Gentus (Hindus) shall be invariably adhered to ”. But in many matters the personal law of Christians, Sikhs, Jains and Buddhists is correspondingly respected and applied by the Courts in India, save where the provisions of particular statutes have abrogated or altered that law.

of such a situation are the effect of an order under the Guardians and Wards Act (VIII of 1890), or where a Court of Wards has assumed superintendence of an infant's estate during his minority.<sup>1</sup> In the case of European and American nationals residing, but not domiciled, in India, the age of majority according to their personal law must be taken to be 21 years.

For many years the balance of Indian judicial opinion was on the side of holding that a minor's contract was only voidable at his option. So to hold was to borrow from the English law. But in *Mohori Bibee's case*<sup>2</sup> the Judicial Committee placed a literal construction upon section 11 of the Indian Contract Act, holding that "the Act makes it essential that all contracting parties should be competent to contract". This view has, of necessity, been since adopted in Indian courts. (See *Mir Sarwarjan v. Fakhruddin Mahomed*, [1912] 39 Cal. 232 and *Ma Hnit v. Hassim*, [1920] 22 Bom. L.R. 531.)

This termination of the controversy as to the inoperative nature of an infant's contract did not, unhappily, remove doubts raised by the spectacle of such contracts as viewed from yet another angle. The question remained: "Was an infant, who had obtained the advantages of a contract by representing himself as of full age at the material time, estopped from relying upon his minority in order to avoid the contract?" The rule of estoppel is, as already observed, a rule of evidence, and, as such, finds a place in the Indian Evidence Act (I of 1872) where by section 115 it is enacted that:—

"When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative, to deny the truth of that thing."

Upon this doctrine as applicable to minors judicial opinion in India has for some time past been divided. In *Ganesh Lala v. Bapu*, [1895] 21 Bom. 198; in *Dada Sahub v. Bai Nahani*, [1907] 41 Bom. 480; and in *Jaaraj Basimul v. Sadashib Mahadeb*, [1922] 46 Bom. 137; A.I.R. 1923 Bom. 169 the Court applied the rule of estoppel embodied in section 115 of the Indian Evidence Act to a minor who had fraudulently misstated his age, and, on that ground, held him bound by his contract. So, too, in a case in 1914 where fraud was not an element for consideration, the same High Court held the minor estopped. (*Fazul Bhoj v. Credit Bank*, 39 Bom. 331.) In 1928, however, a single Judge of the same High Court held otherwise. (*Balangowda Bhimangowda v. Gadi Geppa Bhimappa*, 31 Bom. L.R. 340; A.I.R. 1929 Bom. 201.)

When *Dharmadas Ghosh v. Bhuranull Dutt*, [1898] 25 Cal. 616, 622 was in the Court of first instance, the judge seemed to regard section 115 of the Evidence Act as having no application to minors under the law of India. This decision was affirmed on appeal, (26 Cal. 381, 388, 394). The case ultimately went to the Judicial Committee (*subnomine Mohori Bibee v. Dharmadas Ghosh*) but their Lordships disposed of the appeal without pronouncing upon this particular point. Unhappily too, the Calcutta High Court, in a case decided in 1916 avoided anything like a general pronouncement upon the matter. Nonetheless, it was observed

<sup>1</sup> As to the jurisdiction of a Court of Wards, see p. 25, *post*.

<sup>2</sup> 30 I.A. 114; 30 Cal. 539.

that though it was then unnecessary to consider whether a minor could be estopped in every case, "the law of estoppel must be read subject to other laws, such as the Indian Contract Act, and that a minor cannot be made liable upon a contract by means of an estoppel under section 115 of the Indian Evidence Act when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract". (*Golam Abdin v. Hem Chandra*, 20 C.W.N. 418.)

The High Courts of Madras and Allahabad seem to be agreed that a minor is not estopped from pleading his minority in a suit upon a promissory note (*Baikunta Rama v. Aulhimoolam*, [1915] 38 Mad. 1017; where, however, Wallis J., qualifies his opinion by making use of the expression "in the absence of fraud": other Allahabad decisions do not so qualify the broader view. (See *Kanhilal v. Baburam*, [1911] 8 All. L.J. 1058; *Kanhayalal v. Giridharilal*, [1912] 9 All. L.J. 103 and *Jaganath v. Laltaprasad*, [1908] 31 All. 21, 26, 34). In 1928 the Lahore High Court after reviewing all the principal authorities arrived at the conclusion that section 115 of the Evidence Act is a piece of adjectival law and could not be so used as to nullify the express provisions of section 11 of the Contract Act, which is part of the substantive law of the land. It is submitted that this latter decision represents the true view of the matter.

It follows from this statutory incapacity of an infant in India, that he cannot, as in England, ratify a contract into which he purported to enter during his minority.<sup>1</sup> Nor, for a like reason, can he make an agreement which can be specifically enforced. It is otherwise, however, if a contract has been properly entered into by a guardian, or manager of his estate, for and on behalf of an infant. But a guardian or manager cannot in every case bind him. The contract must be one which the guardian is himself competent to enter into on behalf of his ward; and, secondly, it must be for the ward's benefit. If, in fact, either of these conditions be lacking the contract is wholly unenforceable by either party. (*Eltwaria v. Chandranath*, [1906] 10 C.W.N. 763; *Chitalmull v. Jagannath Prasad*, [1907] 29 All. 213; *Baburam v. Syedunnissa*, [1913] 35 All. 499.)<sup>2</sup>

**Lunatics.**—Section 12 of the Indian Contract Act defines what is meant by a "sound mind" for the purposes of contracting, and provides that even a lunatic may contract during a lucid interval. It would seem to follow that under that Act a person of unsound mind must be held absolutely incompetent to contract. We have found no decision militating against this view. The law is otherwise in England.

India has her Lunacy Act (IV of 1912); but the legislation thus provided is far behind that which is considered necessary in England, in most of the States in Europe, or in the United States of America. Recognised asylums in India are few and the practical difficulties in the way of obtaining medical certificates—curiously easy in almost every other direction—are many. Insurers, therefore, need to take notice of this condition of things.

**Women.**—Quite as important to insurers is the position of Woman in India with regard to her capacity to contract.

<sup>1</sup> It is, naturally, otherwise if the minor on attaining majority chooses to ratify the contract for a fresh consideration. In such a case there would be a new contract, and one with a person who had attained to competency. *Kundari Bibi v. Shree Narayan*, 11 C.W.N. 135.

<sup>2</sup> For a more detailed consideration of the cases relating to contracts by guardians on behalf of their wards, see Pollock and Mulla's Indian Contract and Specific Relief Acts, 6th Ed., pp. 76, 77 nn. (j) and (k).

By the law of India there is nothing which incapacitates a female, *as such*, from entering into a valid contract, so long, that is, that she be over the age of majority according to her personal law. She may, however, avoid a particular contract on the ground of circumstances so connected with her domestic life as would, upon equitable principles, entitle her to claim the protection of the Court. Such are the cases of *pardanashin* women who, in the particular instance, may be shown to have been under a too strong persuasive influence, and to have been at the material time without any competent independent advice. Other instances are provided by cases in which the woman is shown to be without adequate means of understanding the terms of the instrument to which she has put her signature.

As we shall see hereafter, when discussing some of the forms in which proposals for insurance are now-a-days cast, the conditions of Indian life are replete with opportunities for setting up a case against the insurer based upon the allegation that many of the answers relied upon were to questions never so clearly or at all explained as to entitle the insurer to plead warranty.

Because of her capacity to contract, a woman may buy, sell, mortgage or otherwise encumber any property moveable or immovable which is hers or, if shared, then to the extent of her share. Thus she may insure her property; and, generally, may effect any assurance admissible by law, and may assign or otherwise dispose of any policy so effected by her. As, however, neither by her personal law nor by the operation of the Succession Act, nor by the Married Women's Property Act (III of 1874) does a woman, except those mentioned in section 20 of the Indian Succession Act (XXXIX of 1925), lose her separate estate by virtue of the fact of marriage, so, assuming her to enjoy a separate estate, a married woman is answerable in contract to the extent thereof.

Section 20 of the Indian Succession Act is as follows:—

“(1) No person shall, by marriage, acquire any interest in the property of the person whom he or she married or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

(2) This section—

(a) shall not apply to any marriage contracted before the first day of January 1866.

(b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Mohammedan, Buddhist, Sikh or Jaina religion.”

Section 6 of the (Indian) Married Women's Property Act (III of 1874) introduced into India the provisions of section 10 of the (English) Married Women's Property Act of 1870.<sup>1</sup>

In 1882 by the English Married Women's Property Act<sup>2</sup> of that year the Act of 1870 was repealed. The Indian Act, however, remains modelled on the earlier statute.

As originally enacted the Act did not apply to any married woman who at the time of her marriage professed the Hindu, Mohammedan, Buddhist, Sikh or Jain religions, or whose husband, at the time of the marriage professed any of those religions. But a short amending Act

<sup>1</sup> 33 & 34 Vict., c. 93.

<sup>2</sup> 45 & 46 Vict., c. 75.

(XIII of 1923) extended section 6 of the original Act to policies of insurance effected by any Hindu, Mohammedan, Sikh or Jain woman, in Madras after 31st December 1913, and in any other part of British India after 1st April 1923.

The Act still has no application to a woman or her husband who at the time of marriage professed the Buddhist religion.

The sections relevant to insurance, as they now stand read as follows:—

Section 5. "Any married woman may effect a policy of insurance on her own behalf and independently of her husband; and the same and all benefit thereof, if expressed on the fact of it to be so effected, shall enure as her separate property, and the contract evidenced by such policy shall be as valid as if made with an unmarried woman."

Section 6. "(1) A policy of insurance effected by any married man on his own life, and expressed on the fact of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

"When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing."

"And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act No. XVII of 1864 (*to constitute an office of Official Trustee*), section 10."

"Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors."

"(2) Notwithstanding anything contained in section 2, the provisions of sub-section (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Mohanumedan, Sikh or Jain, in Madras, after the thirty-first day of December 1913, or in any other part of British India after the first day of April 1923."

"Provided that nothing herein contained shall affect any right or liability which has occurred or been incurred under any decree of a competent Court passed before the first day of April 1923."

The effect of the foregoing provisions is to create a trust in favour of the wife and or children, as the case may be. The Insurance Act, 1938, by section 39 (7) of the same leaves the foregoing provisions of the Married Women's Property Act unaffected.

It will be seen hereafter that the effect of the new legislation is to remove some of the difficulties which under the general law of India insurers had to meet when faced with conflicting claims, e.g., those on the part of an assured's nominees and of his personal representatives respectively. Such difficulties are, in India, accentuated by the peculiarities of the personal law attracted.<sup>1</sup>

<sup>1</sup> The personal law of the Hindus has recently been amended by the Hindu Women's Rights to Property Act (XVIII of 1937), whereby since 14th April 1937 a Hindu widow obtains under intestacy of her husband a Hindu Widow's estate.

**Persons declared "incapable" by a Court of Wards.**—No commentary, however short, upon the subject of capacity to contract under the law of India should omit mention of certain legislation which, it is thought, has no counterpart elsewhere in the British Empire, whereby the owners of property although under no such disability as hereinbefore described, may yet be declared by a competent Court incapable of managing their own affairs.

Reference is here made to a number of tribunals which are the creatures of certain provincial statutes known as *Courts of Wards Acts*. By these enactments, the local Board of Revenue is constituted what is styled a "Court of Wards" for the purposes of the particular Act. The jurisdiction is strictly limited to the local area to which the Act is expressly made to apply: but the effect is that although the jurisdiction *in rem* is limited to that area, the Court's jurisdiction *in personam* extends to any owner of property so situated, irrespective of that owner's actual or ordinary place of residence.

For the purpose of this treatise, it is only necessary to call attention to the object of this peculiar jurisdiction, and to its significance for insurers as also for others for whom a policy of insurance may have been accepted as security for a loan.

The unique structure of family life in many of the surviving communities of India, and the rapidity with which family property, though joint-owned, may become so encumbered through mere mismanagement that the livelihood of a great number of co-sharers may be imperilled and the Crown's land-revenue become jeopardised, was considered sufficient justification for an attempt to save encumbered estates from dismemberment by the expedient of Government assuming managerial control of them.

To enable this to be done, it is, in practice, necessary for some party, (in many cases, the local Government through an appropriate Revenue Officer) to move the local Court of Wards upon appropriate materials to take charge of the property thus threatened. As a preliminary step to the making of such an order as will enable charge to be assumed, the Court itself must come to a finding, and in due form declare, that such and such a person or persons is or are incapable of managing his or their affairs. Upon the making of such a declaration, the individual or individuals named therein are said in the language of the statute to have become "disqualified proprietors".

Thenceforward, and until such a disqualification is removed by death or otherwise, the affairs of persons so disqualified remain in the hands or under the control of the Court of Wards and the whole of the disqualified proprietor's property vests in that Court during the period covered by the relative decree or order. Thenceforward, too, a plaintiff in any suit against a "disqualified proprietor" must implead the Court of Wards.

It is thus important for insurers to note that an assignment of a policy of insurance, although the policy may have been taken out by an individual not then under this particular statutory disability, would probably be held void and inoperative, if made when the assignor was under an undischarged order of disqualification. So, too, it is submitted, the persons so disqualified could not enter into a valid policy of insurance without the leave of the Court—by Court, meaning of course, the Court of Wards having charge of the proprietor's estate.

**Lawful objects and lawful consideration.**—Of the essential elements of a valid contract enumerated above,<sup>1</sup> that which we have placed first in the list namely the *Intention* of the parties to enter into a binding contract needs, we think, neither explanation nor comment. It is that intention which distinguishes such an agreement from all others. Of the second pre-requisite of an enforceable agreement namely, of the legal capacity to contract, a comment sufficient for the purpose of a short treatise on insurance has already been offered. The provisions of the Indian Contract Act touching the legality or illegality of arrangements intended by the parties thereto to be binding as contracts, properly so-called; have now to be discussed.

The affirmative statements in section 23 of the Contract Act have, in this connection, first to be noticed. They are thus phrased :—

“23.—The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or  
is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or  
involves or implies injury to the person or property of another; or  
the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

There follow some eleven illustrations which have been noted as corresponding very nearly to those framed by the Law Commissioners in the first draft of the Bill, where they appeared in clause 10. The section, itself, however, is not the same. While it is permissible to speak of “the necessity of sufficient consideration to support a contract”—and such a proposition expresses the true view of the law whether in England or in India—under neither system do we speak of the “consideration” for an “agreement”. Under the Indian Act, indeed, the word “consideration” is used to mean that which “supports” a particular “promise”. Accordingly, in order to bring the wording of section 23 into line with the Act as a whole, we have to understand the word “object” to mean “purpose” and the word “agreement” to mean “promise”.

In such a treatise as the present, the various conditions so enumerated in section 23 need not each of them be made subject of comment. A few instances, all of them having reference to policies of insurance will, perhaps, best serve the purpose :

(1) Insurance on a ship or goods is void where the voyage covered is unlawful to the knowledge of the owner, for, “where the object of an Act of Parliament is to prohibit a voyage, the illegality attaching to the illegal voyage attaches also to the policy covering that voyage, if the illegality was known to the assured”. It is said, however, that acts of the master or other persons though sufficient to render the voyage illegal will not, unless known to the owner, vitiate the policy. (*Wilson v. Rankin*, [1865] L.R. 1 Q.B. 162; *Dudgeon v. Pembroke*, [1874] L.R. 9 Q.B. 581 at p. 585.) The omission of the statutory requirements for the protection of seamen and passengers may for the above reasons vitiate the policy. So may anything in a nature of trading with an enemy.

<sup>1</sup> See p. 18.

For alien enemies cannot insure ; and consequently an insurance effected by persons in that category is void as against public policy. (*Jansen v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484.)

(2) Naturally too, a contract of insurance would be manifestly bad for illegality, were it to involve participation in or abetment of something constituting an offence under the criminal law of the land. For example, the insurance of arms or ammunition by persons unlicensed or otherwise disqualified to possess them, or, indeed, of any article of contraband whether to be landed, transported or secretly stored, would obviously fall within the category contemplated. So would the insurance of stolen property, where the knowledge that it was such, was present to the mind of the insurer at any time material to the contract. And the reader must be reminded that even if the grant of the policy was innocent, the same would become unenforceable by the insurer the moment he became aware of the true state of things.

(3) Many of the implements in use by the modern burglar are ingenious and costly. It is conceived, however, that a policy designed to insure their owner against the loss of or damage to them would be unenforceable for a like reason. So would a policy covering goods known to the insurers as consisting of, or including, such things as indecent pictures or treasonable publications.

**Wagering.**—The similarity of certain of the then prevailing types of insurance to mere wagering contracts was early made the subject of judicial comment in England. (e.g., *Carter v. Boehm*, [1763] 1 W.Bl. 594 and *Godsell v. Boldero*, [1807] 9 East 71.)

Before 1848 the law relating to wagers in British India was the Common Law of England. At Common Law, an action lay on a wager so long as its subject matter did not outrage the feelings of third parties or was not for some reason held to be contrary to public policy. Technically, a wagering contract at Common Law was good. But gradually as public opinion tended to condemn wagers the Judges sought, and affected to find, a number of curious reasons whereby such actions might be defeated. Finally, however, by 8 and 9 Vict., c. 109, section 18 they were declared null and void.

The law in India applicable to the matter today is to be found in section 30 of the Contract Act which expressly provides that agreements by way of wager are void, and bars any suit for recovering winnings on any wager, or anything entrusted to any person to abide the result of any game or other uncertain event upon which any wager may have been made.

The remaining provisions of the section are important to potential insurers. They are in these words :—

“ This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered, into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.”

“ Nothing in this section shall be deemed to legalise any transaction connected with horse-racing, to which the provisions of section 294-A of the Indian Penal Code apply.”

The penal section above referred to makes unlawful the keeping of any office or place for the purpose of any unauthorized lottery and

makes punishable the doing of various acts towards the running of any such lottery.<sup>1</sup>

In spite of the fact that modern insurance is not often attempted to be effected under circumstances which to Judges of the 18th century and early 19th century caused such transactions to appear hardly distinguishable from mere wagers, to the casual student, contracts of insurance must necessarily bear a certain superficial resemblance to wagering contracts. Actually, however, they are transactions of a different character. For example, A insures his cargo with X, an underwriter, that is to say, he agrees with X that in consideration of his paying a premium of £50, X will pay him £5,000 if the cargo is lost by certain specified perils. Such a transaction is quite different from the transaction of backing a horse to win the Derby. To take another example, A insures his life. By insuring his life A does no more than buy a certain future provision for himself or his family at a price which is fixed according to the number of years he lives. If he lives a long life, the transaction proves a financial loss to him; but most commercial transactions involve to some extent the element of chance in the sense that it is not often to be predicted with any certainty that there will necessarily be a profit to either side.

A wager has been defined as "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event";<sup>2</sup> the consideration for such a promise is either something given by the other party to abide the event, or a promise to give, upon the event determining in a particular way. In *Hampden v. Walsh*, [1875] 1 Q.B.D. 189 Cockburn C. J. defined a wager as "a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening" and said that since the passing of 8 and 9 Victoria c. 109 there was no longer as regards action any distinction between one class of wager and another, all wagers being null and void at law by the Statute. Lord Justice Cotton in *Thacker v. Hardy*, [1878-79] 4 Q.B.D. 685 at page 695 describes a wager in the following terms: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature, that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win."

As late, however, as the case of *Salt v. Northampton*, [1892] A.C. 1, 21, Lord Bramwell is heard saying:—"All life insurance is a sort of wager. I stake £20 a year, as long as I live, against £1,000 to be paid to my executors when I die. If I die early I win, if I live long I lose." To understand Lord Bramwell aright one must imagine a certain emphasis on the word *sort*: for Kennedy L. J. observed in *Griffiths v. Fleming*, [1909] 1 K.B. 805 at p. 821 "A man does not gamble on his own life to gain a pyrrhic victory by his own death".

In *Alamai v. Positive Government Security Life Assurance Company*, [1898] 23 Bom. 191 one of the Judges (Fulton J.) discussed the distinction between section 30 of the Indian Contract Act and the relative English statute and came to the conclusion that distinction there was none. The Court in that case held that in India an assurance for a term of years on the life of a person in whom the insurer had no interest was void under this section. In that case the defendant company issued a

<sup>1</sup> The word lottery is here used as importing a distribution of prizes by lots or chance (*Taylor v. Smetten*, 11 Q.B.D. 207; *Barclay v. Pearson*, [1893] 2 Ch. 154, 164; *Kamakachi v. Apparu*, 1 M.H.C.R. 448, 449).

<sup>2</sup> Anson, *Law of Contract*, 17th Ed., pp. 221, 322.

policy for a term of ten years for Rs.25,000 on the life of one Mehbub Bi, the wife of a clerk in the employ of the plaintiff's husband. About a week after, Mehbub Bi assigned the policy to the plaintiff. Mehbub Bi died a month later, and the plaintiff as assignee of the policy sued to recover Rs.25,000 from the defendants. It was held on the evidence that the policy was not effected by Mehbub Bi for her own use and benefit, but had been effected by the plaintiff's husband for his own use and benefit, and that it was void as a wagering transaction, he having no interest in the life of Mehbub Bi.

In a later Madras case, decided in 1901, *Vappakandu Marakayar and Anr. v. Annamalai Chetti*, 25 Mad. 561, Davies J. held that an agreement whereby "A" lent a sum of money to "B" on the risk or security of a ship belonging to "B", was void under section 30 of the Indian Contract Act on the ground that the agreement was by way of wager.

The definition of wager enunciated by Cotton L.J. in *Thacker v. Hardy* was cited with approval by Lord Herschell L. C. when delivering the judgment of the Privy Council in *Forget v. Ostigny*, [1895] A.C. 318 at p. 326. Again in *Richards v. Stark*, [1911] 1 K.B. 296 at p. 302, Channell J. discussed this definition and approved of it. A wager may be made upon the length of the Ochterloney monument or of the Kutub Minar or upon the result of an Assembly or Municipal Election. The uncertainty in a wager rests in the minds of the parties, and so, the subject of the wager may be said to be the accuracy of each man's judgment rather than the determination of any particular event. Doubtless, the parties must contemplate the determination of the uncertain event as the sole condition of their contract.

Much earlier than all these decisions, namely in 1867, Lord Blackburn had thus stated the distinction between a wager and a policy:—"I apprehend" said he "that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to." (*Wilson v. Jones*, [1867] L.R. 2 Ex. 139 at p. 150.)

We have here an emergence of the doctrine of "Insurable Interest", a topic more proper for discussion in a later Chapter.

**The Consensus ad Idem.**—A year before the Indian Contract Act passed into law, an English Admiralty Judge had made use of the following words:—"It is essential to the creation of a contract that both parties should agree to the same thing in the same sense."<sup>1</sup> Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name had a different person or ship in his mind no contract would exist between them: *Raffles v. Wichelhaus*, 2 H. and C. 906; 133 R.R. 853."<sup>2</sup> He went on: "But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: *Scott v. Littledale*, 8 E. and B. 815."

"But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, has discovered that the

<sup>1</sup> Sec. 13 of the Contract Act reads:—"Two or more persons are said to consent when they agree upon the same thing in the same way."

<sup>2</sup> An American case.

vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley that a promise is to be performed 'in that sense in which the promisor apprehended at the time, the promise was received', and may be thus expressed: 'The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it. And in considering the question in what sense a promisee is entitled to enforce a promise it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent.' (Per Lord Hannen, in *Smith v. Hughes*, [1871] L.R. 6 Q.B. 597, pp. 609-610.)

The lay reader, however, must not suppose that the doctrine expressed by the words *consensus ad idem* would entitle a party to a contract to avoid it merely by asserting that he did not understand some material clause or condition in the sense in which the material words would ordinarily and naturally be read. On the contrary, equitable rules of evidence will be found to be in the way of him who is minded to get rid of his obligation by an expedient of this character. Thus, a party to a contract in writing is, *ipso facto*, deemed to agree to be "bound, in case of dispute by the interpretation which a Court of Law may put upon the language of the instrument." (*Stewart v. Kennedy*, [1890] 15 A.C. 108, per Lord Watson at p. 123.) And again: "If there had been an ambiguity and the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own construction upon the contract, and having acted upon a certain view, had thereby agreed to accept it as the true view of its meaning." (Per Greer, L. J., in *W. T. Lamb & Sons v. Goring Brick Co.*, [1932] 1 K.B. 710 at p. 721.)

In contemplation of law there is no *consensus* at all unless it be freely given. It is this conception of the matter which informs those provisions of the Indian Contract Act which expressly recognize the dangers attendant upon coercion or any undue influence.

Section 15 of that Act defines "coercion" and section 16 "undue influence". Section 19 includes "coercion" amongst the grounds upon which a contract may be avoided at the option of a party whose consent thereto was so caused; while section 19A gives a similar option to any party whose consent was caused by undue influence provided that the party so entitled to avoid it has received no benefit under the contract; in which case, the Court will permit avoidance only upon such terms and conditions as to it may seem just.<sup>1</sup> The High Court in Allahabad in a recent case (*Sundar Rai v. Suraj Bali Rai*, [1925] 47 All. 932) regards refusal of terms suggested by the Court as leaving the discretion unfettered.

If either of the parties or both of them be under an erroneous impression as to some circumstance going to the root of the contract, it would appear that there was never that *consensus ad idem* which, as heretofore stated, is necessary to a completed contract.

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<sup>1</sup> Compare secs. 35 and 38 of the Specific Relief Act (I of 1877).

Equity, in the manner already indicated, may intervene to prevent the merely careless or the disingenuous from setting up a case founded upon some purported misapprehension of language plain in itself. So much has been stated already. But a genuine mistake of the character mentioned below gives certain rights of avoidance grounded in the notion that what is thus sought to be avoided is not the contract which the parties intended to be entered into.<sup>1</sup> The rights thus made available for the purpose of avoiding a contract other than the one intended, are to-day strictly circumscribed by well-established rules.

Related in much the same manner to the doctrine of *MISTAKE* is an erroneous belief engendered in the mind of one party to a contract by the misrepresentation or by designedly deceitful conduct on the part of the other. In such cases where, but for the misrepresentation or the deceitful conduct relied upon, the party so aggrieved would not have entered into the contract at all, the law provides remedies as appropriate as are those available to victims of coercion or of undue influence. The effect of mistake whether bilateral or unilateral is dealt with in sections 20-22 of the Indian Contract Act. The doctrine underlying the last-named section must, however, be carefully distinguished from that which informs section 13 upon which a brief comment has already been offered. Misrepresentation is defined in section 18 and Fraud in section 17. By the provisions of section 19 the victim of coercion, misrepresentation or fraud may, at his option, avoid the effects of the agreement to which his consent has been thus obtained; but as will hereafter be shown, he must bring himself within the terms of the Exception stated in the section read, as it must be, with the Explanation appended thereto.

It remains briefly to indicate under the foregoing heads what those reliefs, under the general law in India, amount to.

**Coercion.**—The definition of coercion in section 15 is interesting. It is thus worded:—

“ ‘Coercion’ is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.” It is added, by way of explanation, that “it is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed”. Thus the Penal Code is merely used as some measure of the kind of wrongful conduct which may so operate on the mind of the victim, as to induce him to consent where but for the act or the threat to commit it, he would not so consent.

The principle thus enacted goes far beyond anything known to the English Common Law or of which Courts of Equity took cognizance. For example, it is, under this section, sufficient to entitle the victim to avoid the contract if the coercive measures were imposed by a stranger to the agreement. It is, thus, the absence of free and unfettered choice which governs the right to rescind.

**Undue Influence.**—Section 16 is not merely definitive in character but includes important provisions which belong rather to the domain of adjectival than to that of substantive law. The first two sub-sections belong to the former category and read as follows:—

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<sup>1</sup> See the reference at page 34, *post*, to the old defence of *non est factum*.

" 16. (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

- (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other : or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress."

The third sub-section was introduced into the Act by an amendment made in 1899.<sup>1</sup> Its provisions are important to litigants. They are these :—

" (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872."

It is thought that in such a treatise as the present, it will be sufficient for the purposes of this chapter briefly to indicate the directions in which the provisions of this section may have a special interest for those who engage in contracts of insurance ; relegating a more detailed examination to a later chapter. Broadly speaking, this section codifies principles which derive directly from the equitable doctrine of undue influence as developed in England. That doctrine had, in several instances, been applied by Courts in India before the Act was amended in 1899. The peculiar structure of Indian Society, especially that which embodies the notion of a joint family as the same is understood in Hindu Law, the authority at once wide and intimate exercised by religious teachers of all denominations, the reverence paid to personal religious preceptors, and perhaps, above all, those long-established customs by which the vast majority of women in India are obliged to lead a life of seclusion, lend to the protective features of this section an added importance.

The attention of those interested in contracts of Insurance may then be specially directed first to clause (b) of sub-section (2) which imports the notion of "age, illness, or mental or bodily distress"—not necessarily so *impairing*<sup>2</sup>,—but so *affecting*<sup>3</sup>, the mental capacity of a party to a contract, as to enable the other party to dominate his will. Observe, too, that the effect of age, illness, or of the other causes mentioned, need not be permanent. It is sufficient if it (a) exists at the material time, and, (b) enables the other party to make use of it.

Contracts made with women are, of all others, the most likely to give rise to defences founded upon this doctrine. It is for this reason that the choice of agents, sub-agents, and of medical examiners, needs to be made with more than the ordinary caution which experience in lands where women are not so secluded suggests as necessary, and that their

<sup>1</sup> Indian Contract Act Amendment Act (VI of 1899), sec. 2.

<sup>2</sup> The italics are the Author's.

instructions should be rather more elaborate; while, on the other hand, any such defence, if raised, needs to be most carefully examined. Moreover, it should be noted that it has been held in *Badiatannessa Bibee v. Ambica Charan*, [1914] 18 C.W.N. 1133 that "the undue influence which may affect a *purdanashin* lady's understanding of a document may proceed from a third party". In that case, the parties to the document were the lady on the one side and her husband's creditor on the other; and it was the undue influence of the husband, and not of the creditor, which was held sufficient for the Court to set aside the document.

Since the beginning of the 20th century, there has been some attempt to obtain for contracts to which Indian ladies, not in complete seclusion, are parties, the same measure of protection which the law in India has long extended in the matter of burden of proof to women *purdanashin* in the strict sense of that term as known to Hindu or Moslem Law and custom. The decisions in *Shaik Ismail v. Amir Bibi*, [1902] 4 Bom. L.R. 146; *Ismail Mussajee v. Hafiz Boo*, [1906] 33 Cal. 773 and the earlier decision of the Privy Council in *Hodges v. The Delhi and London Bank Ltd.*, [1901] 27 I.A. 168 all point the same way: that such special protection will not be expressly extended. In the last-named case, their Lordships met with a suggestion that the Plaintiff was *quasi-purdanashin*, an expression which their Lordships took "to mean a woman who, not being of the *purdanashin* class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *purdanashin* must be extended to her". "The contention" they observed "is a novel one, and their Lordships are not favourably impressed by it". Their Lordships, however, went on to state that "outside the special class" so long recognized by the Courts as *purdanashin* "it must depend in each case on the character and position of the individual woman, whether those who deal with her are or are not bound to take special precautions that her action will be intelligent and voluntary, and to prove that it was so in case of dispute".

It is worthy of notice that by the express terms of section 16, those of sub-section (3) thereof are not to affect what had been already enacted in section 111 of the Indian Evidence Act (I of 1872).<sup>1</sup> The principle thus attracted was founded upon the long-established practice of equity whereby a person whose use for his apparent advantage of some position of trust or special confidence reposed in him by another, must, on a challenge by that other as to his good faith regarding a particular transaction between them, assume the burden of establishing that he was throughout actuated by good faith.

**Mistake.** (a) *Of Fact*.—Section 22 of the Indian Contract Act is in the following words:—

"22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact."

While section 20 reads as follows:—

"20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

<sup>1</sup> Section 111 of the Indian Evidence Act is in these terms.—"Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

*Explanation.*—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact."

To the layman, as to many a student, it might well seem that unless an erroneous belief (and one essential to the contract) be shared by both the parties the contract is neither void nor voidable. Happily such is not the law of the land. Were it so, the whole doctrine expressed in the three Latin words *consensus ad idem* would have but little applicability to the law of contract in British India. In England, under the old system of pleading, whenever a party sought to avoid a contract on the ground of some erroneous belief but for which he would not have entered into it, the old test was: "were the facts sufficient to establish the old Common Law defence of *Non est factum*?"<sup>1</sup> This plea usually covered an allegation that whatever the document relied upon as expressing the contract might look like, the party seeking to avoid its incidence had, in fact, not meant to enter into such a contract at all; and thus, in contemplation of law had not done so.

Neither in England nor in India is the word "mistake", in any true sense, a term of art. Thus is it that a fundamental error on the part of only one party may have so operated as to prevent the formation of any real agreement upon the same thing. Such mistakes, then, though in fact and logically-speaking, *unilateral* in character, will, notwithstanding the provisions of section 22 of the Indian Contract Act prevent the other party from enforcing the contract and will entitle the party labouring under the error to rescind, not on the ground of a "mere" mistake, but on the footing that the two parties were, in the particular circumstances disclosed, never *ad idem*.

The principle has been clearly stated in a recent case. "It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty." (*Per Lord Wright, delivering the Judgment of the Privy Council in Norwich Union Fire, etc. v. W. H. Price Ltd.*, [1934] A.C. 455, 463.)

Earlier in the same Judgment, it had been observed that "the only transaction with which the mind of the appellants (the insurers) went, was payment of a claim on the basis of the truth of facts which constituted a loss by perils insured against: they never intended to pay on the basis of facts inconsistent with any such loss by perils insured against".

The reader is warned that cases of this description are but exceptions to the general rule of law that a mistake, *as such*, has no legal effect, and that an error entertained by one of the parties needs to be fundamental in the sense indicated in the case cited, if it is to operate towards the avoidance of a contract on the ground of an absence of *consensus ad idem*.

Such fundamental errors have been classified as those concerning the nature of the transaction, the identity of the other contracting party and the subject-matter of the agreement.

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<sup>1</sup> That is to say, "the contract relied upon was not made".

The provisions of section 22 bar a party from placing reliance upon any other class of error save those arising from the misrepresentation or fraud of other parties to the contract.

Informed by a similar conception are those decisions—naturally, few in number—which have found some essential term of a contract in writing to have been cast in language so ambiguous that the party seeking to avoid may reasonably have read it in one way, at the material time, although the other contracting party may as reasonably have read it in another. Such cases are always peculiar and form exceptions to the general rule whereby parties to written contracts are impliedly “bound” as Lord Watson said in *Stewart v. Kennedy*, [1890] 15 A.C. 108, 123 “by the interpretation which a Court of Law may put upon the language of the Instrument”, as contrasted with any private interpretation of their own. But the real *ratio* governing the decision of these exceptional cases is that a Court, having regard to the peculiar facts and taking into consideration the singular circumstances of the case before them, accepts the private interpretation of each of the parties as reasonable, though irreconcilable, and thus reaches the conclusion that the parties in respect of the essential term thus in dispute were never *ad idem*.

We shall return to the foregoing topic as also to those kindred matters to which reference has just been made, when, later on, we are considering the somewhat complicated circumstances which often surround particular classes of insurance business. But at the outset the reader should be reminded of the dangers which attend upon dealings with illiterate or semi-literate individuals; since in such circumstances are to be found abundant opportunities for a genuine misunderstanding on the part of such individuals as to the full implications of the contract into which they may appear ready enough to enter. It is in consequence of this state of things that insurers in this country when dealing with parties so situated should exercise the greatest caution to secure not only a proper and sufficient explanation on their own behalf of every essential term of the agreement, but should by suitable rules impress upon their representatives the necessity of satisfying themselves that the true import of every technical question which the proposer has to answer is understood by him. In a country where the language of superior commerce is English, but where proposers may ordinarily employ in their domestic and social affairs one of some 250 Asiatic languages, it is not difficult to imagine a complete misunderstanding of something going to the root of the contract, and, therefore, in any contest at law, how strongly a case for the defendant may be found entrenched.

(b) *Of Law*.—The relative section of the Act is section 21 and reads as follows:—

“21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

#### ILLUSTRATION.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation. The contract is not voidable.”

Here again the terms of the section need to be read in the light of the provisions of sections 10 and 13, namely, that any error of a character

so fundamental as to have prevented the parties at the material time from being *ad idem* will vitiate the contract, in the sense that it will enable the Court to find that there was no contract at all. This, as already observed, is as true of unilateral mistake of so effectual a character as it would be of bilateral mistake.

It is thus itself a vulgar error to suppose, as has sometimes been said, that the individual citizen is *presumed* to know the law of the land. The heresy arises from a misuse of the maxim:—*ignorantia juris haud excusat*. So far back as 1846, in *Martindale v. Falkner* (2 C.P. 706, 719), Maule J., used these words, "There is no presumption in this country that every person knows the law: it will be contrary to commonsense and reason if it were so." That very learned Judge went on to state the rule of the Common Law to be that "ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime or from liability upon a contract". Maule J., was a Common Law judge and was not concerned in that decision to compare the rules of the Common Law with principles of Equity which had long sought to mitigate those rules and could so mitigate them in matters of which the Court of Chancery might take cognisance. The viewpoint of Equity in relation to the foregoing maxim is well illustrated by the Judgment of Lord Westbury in *Copper v. Phibbs*, L.R. 2 H.L. 149, 170. "In that maxim," said he, "the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake."

The above represents, in outline, the view of the matter which since the Judicature Acts of the 'seventies of last century may now be urged in any Court of Justice. Courts in India have not hesitated to follow the English decisions on the point, e.g., *Ram Chandra v. Ganesh Chandra*, [1917] 21 C.W.N. 404; *Appavoo Chettiar v. The S.I.Ry. Co.*, A.I.R. [1929] Mad. 177. The last-mentioned case is interesting in that it regards payment by mistake of an unauthorized surcharge to be a pure mistake of general law within the true meaning of the maxim.

What the law says to the general citizen, then, is no more than this. It is within the power of the citizen to find out what the law is; and in matters of liability under that law whether such liability arises under the law of crime or of that of contract, he cannot avoid them on the ground merely that he did not know what was the law by which his liability was governed or was to be tested.

**Misrepresentation.**—In some sense, it is the representation of supposedly existing facts which is ever present in all preliminary negotiations whose aim is the formation of a contract; and it is some representation or other which succeeds in bringing the parties ultimately to agreement. It is difficult, indeed, to conceive a contract in which either by direct or by some indirect method, material circumstances are not so represented by one party as to constitute influences predisposing the other party to agreement. It does not follow, however, that every representation operates as an inducement. Thus it is that not every misrepresentation will entitle a party to avoid a contract on that ground. In

general, it may be said that a party seeking to avoid a contract may always do so if the misrepresentation relied upon as having induced the consent was fraudulent, or if the supposed truth of the matter stated was so strong a predisposing influence that but for a belief in its truth the party thus led astray would not have entered into the contract at all.

A special class of representations, however, are now-a-days known as "warranties" and it is one of the curiosities of the Indian Contract Act that it nowhere defines a "warranty". Nor does the Act in terms treat representations under those categories familiar to the English student as "innocent" and "fraudulent" representations. It prefers to define "Misrepresentation", properly so-called, and to treat the topic of "fraud" separately.

This state of things would seem largely referable to the fact that section 18 of the Indian Contract Act which defines Misrepresentation was modelled upon the draft civil code of New York, while section 17, which defines fraud, was modelled upon the then accepted English jurisprudential conception. The two sections are thus respectively worded:—

"17. 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

*Explanation.*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

"18. 'Misrepresentation' means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

The legal effect of a "misrepresentation" by one of the contracting parties inducing the other party to consent is to make the contract voidable at the option of the party misled (section 19). And this is equally true where the representation belongs to the class known as "warranties"; for there the other contracting party may at his option rely upon the breach or, if it suits him, may waive it. Thus, the party misled, on discovering the untruth of the representations made has the following

courses open to him :—(a) he may affirm the contract, or (b) may repudiate it, and in that case, may, if sued upon it, (i) set up the misrepresentation or the breach of warranty as a defence ; or, (ii) may himself sue for rescission of the contract. Under the Indian Contract Act, the apparent rights set forth above, are subject to these qualifications, namely, that a misrepresentation, fraudulent or otherwise, which has not, in fact, operated as an inducement to consent, does not render the contract voidable ; nor will such misrepresentation whether by affirmation or by silence, though fraudulent, and notwithstanding its operation as an inducement to consent, avail to avoid the contract if the party misled could with ordinary diligence have discovered the truth. (Section 19.)

**Warranties.**—There remains to discuss that special class of representations which are styled "warranties". For though the Indian Contract Act, as already observed, has nowhere expressly dealt with the topic of "warranties", the general law of the land implies, both in relation to the sale of goods and in relation to contracts of Insurance, both the concept of a warranty which has been evolved by English Law and the legal consequences which that law recognizes as following upon a breach. See *New York Life Insurance Company v. Phoebe Shella Gamble*, [1900] 27 Cal. 593 ; *Condogianis v. Guardian Assurance Company Ltd.*, [1921] 2 A.C. 125 ; *Great Eastern Life Assurance Co., Ltd. v. Hira Bai*, [1931] 55 Bom. 124 ; *The Provincial Insurance Co., Ltd. v. Morgan*, [1933] A.C. 240 ; *Vulcan Insurance Co. v. Dawsons Bank and Anr.*, [1933] 11 Rang. 266.

The use of the word "warranted" in sub-section (1), in a sense unknown to the law of England or to the law of India as the same stood prior to 1872, has been described by two great jurists as "an elementary fault".<sup>1</sup> The same learned writers have regarded sub-section (2) as obscure and apparently useless, and sub-section (3) as involving confusion between contracts voidable because consent was obtained by misrepresentation, and transactions without legal effect, because there was no legal consent at all. The first sub-section was considered as far back as 1879 and sub-section (3) one year later by the Bombay High Court in circumstances which do nothing to remove the obscurities and confusions thus noticed.<sup>2</sup>

For all practical purposes however, and especially for those affecting contracts of insurance, assertions made as of fact which the parties agree shall form the basis or part of the basis of a contract (in the sense that the contract is made upon the footing that the assertions are true) are to be regarded as in that special class of representations now-a-days styled "warranties".<sup>3</sup>

<sup>1</sup> The late Sir Fredrick Pollock and the late Sir Dinshah Mulla in the 6th Edition of their treatise upon the Indian Contract and Specific Relief Acts, p. 119.

<sup>2</sup> *Oriental Bank Corporation v. Fleming*, 3 Bom. 242, 267 ; *In re Nursey Spinning and Weaving Co., Ltd.*, 5 Bom. 92.

<sup>3</sup> It may aid the Indian student to understand how this word "warranty" has come to assume its special position as a term of art by recalling its origin and uses in other contexts. The word "warrant" is from the old French "*warant*, *warand*" a variant of *g(u)rant* ; and is thus intimately connected with the notion of a "guarantee" in the sense of an assurance authoritatively expressed. From this notion derives the use of the word *warrant* as expressive of an authority upon which reliance may be placed by the person to whom the authority is addressed. In this manner the word has attached itself to the document expressing and conveying the authority, e.g., a *warrant* authorizing someone to act as the attorney or agent of another ; a *warrant* authorizing the person therein named to arrest another. The passage in sec. 18 of the Indian Contract Act to which reference has been made above

"A warranty is an express, or implied, statement of something which the party undertakes shall be part of a contract, and though part of the contract yet collateral to the express object of it." (*Per Abinger, C. B.*, in *Chanter v. Hopkins*, 4 M. & W. 399, 404=8 L.J. Ex. 16; quoted by *Martin, B.*, in *Azemar v. Casella*, 36 L.J. C.P., p. 264.) In Charterparties and Marine Insurance "Warranted" or "Warranty" is, and for many years has been, synonymous with a "Condition" strictly binding on the party making it. (*Per Williams, J.*, in *Behn v. Burness*, 3 B. & S. 753=32 L.J. Q.B. 205; *Burnard v. Faber*, [1893] 1 Q.B. 340=62 L.J. Q.B. 159.)

A summarized view of the position now attained by the word "Warranty" in the law of England was made by Lord Haldane in *Dawsons Ltd. v. Bonnin*, [1922] 2 A.C. 413: "The proper significance of the word warranty in the law of England is an agreement which refers to the subject-matter of contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract. Yet irrespective of this, the word came to be employed in England when what was really meant was something of wider application, a pure condition."

A long chain of cases from *Newcastle Fire Insurance Co. v. Macmorran*, [1815] 3 Dow. H.L. 355 to *Paxman v. Union Assurance Society*, [1923] 39 T.L.R. 424 has decided that once it is incorporated in any contract of assurance that a particular statement shall form the basis of the policy the truth of the statement is warranted. Such a warranty must be discoverable in the policy or incorporated therein by reference. It is important to remember that the effect of the warranty is to render the materiality of the statement irrelevant. What matters and what is asserted is its truth. Nor is the innocence or otherwise of the person making the untruthful statement relevant. It has been held that he warrants not only the truth, but, in certain circumstances, the correctness of the form in which the statement is cast (*Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K.B. 863, 885.) There is recent authority in America for the view that if a fact is warranted and the truth is otherwise the policy will be avoided notwithstanding that the insurer was aware of the true facts (*Guimond v. Fidelity-Phoenix Insurance Co., of New York*, [1912] 9 D.L.R. 463); but such a view is, it is submitted, quite untenable under the Indian Contract Act.

An implied warranty or covenant is founded on the presumed intention of the parties, the object aimed at being "to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men: not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events,

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(i.e., "not warranted by the information of the person making it") is, in a literary sense, correct enough; since it means no more than that the information has not the backing of sufficient authority. The fault lies in using the word "warrant" in that non-technical sense. It remains to note, nevertheless that the word warranty has attained its present technical meaning in the law of contract as in recognition of the "authority" of the person making the assertion that he consents to be bound by it as by any other term of the contract, although the subject of the asseveration may be collateral only to the object of the contract itself. In such wise the Warrantor is (in a literary sense again) the Guarantor of the truth of the matter stated. Thus the modern technical use of the word "warranty" is seen not to be so far removed, after all, from its earliest significance.

as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances". *The Moorcock*, [1889] 14 P.D. 64, 68. See also *Comptoir Commercial Anversois v. Power*, [1920] 1 K.B. 868 per Bailhache J. at p. 879.

Lord Russell, J. in *Badische Co.'s case*, [1921] 2 Ch. 331, 379, says as follows :—

"The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or the circumstances. The dissolution lies not in the choice of one or other of the parties but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract. These general statements are, I conceive, justified by the language used and the views expressed by Lord Sumner in *Bank Line v. Capel & Co.*, [1919] A.C. 435 and by the Lords before whom was argued the *Tamplin Case*, [1916] 2 A.C. 397." In *Dahl v. Nelson*, [1881] 6 A.C. 38, at p. 59 Lord Watson had said "there may be many possibilities within the contemplation of the contract . . . which were not actually present to the mind of the parties at the time of making it, and, when one or other of those possibilities becomes a fact, the meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence".

That the principles under which warranties are created are, as applied to contracts of insurance, the same, whether the contracts are in respect of marine, life or fire policies had been well settled in England since at any rate the leading case of *Thomson v. Weems*, [1884] 9 A.C. 671, at pp. 683-684. "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material. The parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material. . . . In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy, is, by whatever words and in whatever place, to be construed as a warranty, and, *prima facie* at least, the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life or fire. . . . But I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies." Whether in marine, life or any other policy of insurance a long chain of cases has established that an express warranty is to be viewed as creating a condition precedent, the breach of which will avoid the contract. (*Ellinger v. Mutual Life Insurance Co. of New York*, [1905] 1 K.B. 31.)

**Conditions Generally.**—The creation of conditions whether “conditions precedent” or “conditions subsequent” is responsible for much judge-made law not only in Great Britain but in the Dependencies as also in the United States of America. Other conditions have by some writers been referred to as “conditions concurrent”. It is an obvious defect in the Indian Contract Act that the notion of a conditional contract is expressed in terminology foreign to the language of English jurists in reference to contractual obligations. A whole Chapter is devoted to the notion, but that chapter (Chapter III) is entitled “of contingent contracts”. In it the definitive section 31 is thus worded :—

“31. A ‘contingent contract’ is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.”

For insurers of all sorts the effect of stipulations which though made during the preliminary stages may yet be intended to govern the right to a policy at all, is of pre-eminent importance. For while under the general law of contract the intention of the parties as to every term and condition governing a contract in writing is to be gathered from all the relevant documents read as a whole, there has grown up a recognized rule in reference to contracts of insurance—especially applicable to life insurance—creating a presumption that all communications before the execution of the policy are preliminary only. For this reason it is customary to employ in the policy itself phraseology designed expressly to attract the contents of antecedent documents so as plainly to incorporate into the contract itself what but for such express incorporation would be otherwise deemed preliminary only. A recent example of the effect of a stipulation made prior to the issue of a policy and having the effect of a condition precedent to any right in the proposer to receive a policy is presented by the facts in *Harrington v. Pearl Life, etc.*, [1914] 30 T.L.R. 613. There, while accepting the proposal, the insurers had made two stipulations, one being the usual stipulation as to payment of the policy being a condition precedent to the attachment of the risk, the other that there should be a declaration as to no material change in the proposer's health since the date of his medical examination. The proposer made the required declaration, fell ill, made no disclosure of the altered circumstances, and died within a few hours of the payment of the premium. It was held that the insurers, had they known of the altered circumstances, would have been entitled to refuse the premium and that in consequence the proposer by failing to disclose those altered circumstances had forfeited his right to a policy. The same principle was applied in *Looker v. Law Union and Rock*, [1928] 1 K.B. 544 where though a policy had issued, ignorance of the altered circumstances brought about by non-disclosure on the part of the assured was held to entitle the insurer to avoid the contract. The ratio behind these decisions is that the breach of a stipulation operating as a condition precedent to the right to receive a policy is sufficient to destroy that right. The effect, then, will be to render a suit to enforce the issue of a policy in such circumstances, untenable; while any policy issued in ignorance of the breach will be of no effect.

**Fraud.**—The essence of fraud is “deceit”: the word itself meaning no less. Fraud, therefore, as a ground for relief, depends first upon the *factum* of deceit, and not upon the machinations of the deceiver. For, if the person sought to be deceived is not misled, he has been the victim of no more than an attempt which has miscarried. Fraud, however, which is successful, may create a cause of action if accompanied by damage:

or, in the particular circumstances, may afford a ground of defence in a suit based upon contract. The old form of action where damage is the direct result is the Action of Deceit. There is nothing in the law of India which precludes a litigant in a proper case from so framing his suit. But in the present treatise where the rights and obligations of the parties to be discussed arise *ex contractu* any further reference to suits of that character might well seem superfluous.

The definition of Fraud in section 17 has already been set out. The legal effect of fraud in the law of contract in India is dealt with by section 19 marginally titled "Voidability of agreements without free consent" and comprehends not only fraud but coercion and misrepresentation as grounds. It is in these words:—

"19. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true.

*Exception.*—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

*Explanation.*—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

It will be noticed that while active misrepresentation fraudulent in intention is of itself sufficient to enable the party misled to avoid the contract, passive misrepresentation by silence even with intent to deceive and even if successful, will not suffice, if, with ordinary diligence the party misled could have discovered the truth of the matter. It is otherwise in England.

The topic of non-disclosure, fraudulent in intent, is one of no small importance to insurers. It may well happen that part of something material to be known to the insurer may be disclosed and some other part suppressed; and in consequence of such partial suppression of the facts the insurer may be deceived. Such partial suppression, if it have the result predicated, will be a *fraudulent omission within the mischief* of section 19 of the Indian Contract Act as constituting "silence", fraudulent within the meaning of section 17.

It has been frequently pointed out that the border line between fraud and mere misrepresentation on the one hand, and fraudulent misrepresentation and breach of warranty on the other is a narrow one. And so it is. But, for practical purposes connected with contracts of insurance, the breach of a warranty is as good a defence as is fraudulent misrepresentation and is usually the easier to establish.

It has also been said, and that view has been frequently acted upon, that "gross negligence" in regard to material statements may amount to evidence of fraud. Such a view has sometimes been misconstrued and re-stated as if carelessness, however gross, would itself amount to fraud. It is submitted that there is no authority for such a view in relation to the law of contract in British India. For a statement of how apparently mere carelessness or supposed forgetfulness may be evidence

of fraudulent misrepresentation, we may refer to the observations of Lord Selborne in *Brownlie v. Campbell*, 5 A.C. at p. 936: "If his memory had failed, still it was the case of a person who once had certain knowledge of the fact and who could have no right to assert one way or the other a fact as of his own knowledge upon such a subject unless he possessed that knowledge; and if he did assert it, he was bound to make the assertion good. The mere fact of forgetfulness by a man who has known a certain fact, who is asked whether that fact has happened or not, and says positively that it did or did not, cannot possibly be an excuse; because if he had spoken the simple truth he would have said, 'I do not recollect whether it is so or not.' If the fact be that he does not recollect, then by saying that the fact was so, or by saying that the fact was not so, he takes upon himself the responsibility of a positive statement upon the faith of which he knows that the other man is going to deal for valuable consideration."

It is submitted that the phraseology employed in the Indian Contract Act avoids some of the unfortunate effects of the decision of the House of Lords in *Derry v. Peek*, 14 A.C. 337, 360, which, it is submitted, however, nowhere impeaches the validity of the reasoning of Lord Selborne in *Brownlie v. Campbell* cited above. But where the problem is to determine whether the person making the questioned statement did or did not entertain at the time of making it a belief in its truth, there is surely no better test than the one suggested by Lord Herschell in *Derry v. Peek*, at p. 380, namely, "to apply the standard of conduct which our own experience of the ways of men has enabled us to form, by asking ourselves whether a reasonable man would be likely under the circumstances so to believe".

It is thought that the foregoing summary of the general law of fraud as applicable to the general law of contract in British India will suffice for the purposes of the present Chapter.

The niceties involved in those border line cases which from time to time have created difficulties with regard to the liabilities of parties arising under contracts of insurance will be referred to later in their proper place.

The foregoing summary of the general law of contract with reference to defences grounded in misrepresentation (including breach of warranty) presents in outline what the law of the land was in relation to all contracts of insurance up to the Indian Insurance Act, 1938. Contracts of Insurance having reference to marine and all classes of insurance business other than life assurance remain in respect of the foregoing defences in a suit on the policy unaffected by the provisions of that Act.

**Right to question Life Policies curtailed.**—On the other hand the provisions of section 45 of the Indian Insurance Act, 1938 have profoundly modified the hitherto accepted rights of insurers in the matter of avoidance of Life Policies on some of the foregoing grounds. Section 45 reads:—

"No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter and

fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false."

In the result breach of warranty must be raised, if at all, during the first 2 years of the Policy: to avoid which thereafter the insurer must establish that the misstatement relied upon was (1) fraudulent, i.e., with intent to deceive or induce, (2) made by the proposer well knowing it to be false, and (3) that the misstatement related to a matter material to the contract. The insurer, by virtue of the same section, is placed under a similar disability in respect of any life policy effected before the commencement of the Act save that such disability does not begin to run against him until two years shall have elapsed from the said date.

The misstatements so protected cover not only ordinary statements made by the proposer himself which might induce the formation of the contract, but any statement touching the assured whether made by the medical examiner, or referee, or a friend, the truth of which might by agreement have been made the basis of the policy.

The section is not happily worded and seems to the present writers likely to raise difficulties to which further reference will be made hereafter.

**Suits under the Fatal Accidents Act.**—There is one peculiar direction in which the mere existence of a policy of insurance may, it would seem, affect parties to a suit in which the cause of action is not even remotely concerned with any contract of insurance. Reference is here made to a suit for damages instituted under the Fatal Accidents Act (XIII of 1855). This Act was modelled on the English Statute 9 and 10 Vict., c. 93 (1846) commonly called "Lord Campbell's Act", after the great lawyer who was responsible for it. This English Statute was first amended in 1864, but the material amendment affecting those who may have become assignees of Life Policies was effected in 1908 by 8 Edward 7, c. 7 which provides in section 1 that "In assessing damages in any action, whether commenced before or after the passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance whether made before or after the passing of this Act."

This last-named and extremely important amendment was occasioned by a general feeling that it was unfair to allow tortfeasors, i.e., those whose negligence or other wrong-doing had brought about the assured's death, to take advantage of his private providence. The trouble had begun shortly after the passing of Lord Campbell's Act in a case in which one of Lord Campbell's own rulings when sitting at *Nisi prius*<sup>1</sup> had been cited to the Court in support of the proposition that any sum assured to a deceased person and by him assigned to some one who eventually became a Plaintiff under the Fatal Accidents Act in respect of the assured's

<sup>1</sup> *Nisi prius*. The Indian student will remember that civil actions were in the past commonly, and to-day often are still, tried by juries in England: and that the same Judges who went on circuit in England to the County towns partly as Judges of Assize (which represented their jurisdiction over statutory weights and measures) and partly for the purpose of delivering the jails of their prisoners (which represented their criminal jurisdiction) had the further duty of hearing such civil actions as had not been removed to the King's Courts at Westminster. The phrase *nisi prius* is taken from the command issued to Sheriffs to bring jurors for the trial of particular civil actions "unless previously"—and that is the meaning of the two Latin words—the Justice who came into the County had already disposed of the cause. From this phrase the lawyers came to speak of Judges sitting to hear and determine civil actions with juries as "sitting at *Nisi prius*".

death, should be deducted from any sum which a Jury might, apart from any such assured sum, feel inclined to award to the Plaintiff as pecuniary compensation for the loss sustained by that death. (See the note of Lord Campbell's original observations to the Jurors in *Hicks v. The Newport Abergavenny and Hereford Railway Co.* tried at the London sittings in February, 1857 cited at p. 403 in the Report of *Pym v. Great Northern Railway Co.*, 4 B. & S. 397; 122 E.R. 508.)

Unfortunately there has been no amendment of the Indian Fatal Accidents Act corresponding to the sensible provisions effected in the English Statute by the amending Act of 1908. In consequence of this state of things it may well be that a Judge in India may feel himself compelled to follow Lord Campbell's view.

**Restraint of legal proceedings.**—The general policy of the law of England favoured a strict protection of a citizen's right to have any dispute arising out of his contractual relations with a fellow citizen decided in a Court of Law. In accordance with this policy, agreements restraining legal proceedings so as absolutely to exclude the would-be litigant from any recourse to the ordinary tribunals were held void. As time went on, it became necessary somehow to reconcile the generality of this doctrine with the wishes of the commercial community to resort to private arbitration in certain classes of cases, and to incorporate in their contracts an agreement so to do. In India, as in England, there is an Arbitration Act,<sup>1</sup> the effect of which is to afford legal sanction to the decision of an arbitrator so long as he shall have performed his duties properly and in accordance with the expressed intentions of the parties. So, where parties to a contract have agreed to submit their disputes to an arbitrator or arbitrators, but nonetheless one of them institutes proceedings in an ordinary Court of law upon the same cause of action, the Court will exercise its powers to stay such a suit until the remedy by arbitration has, in one manner or another, been exhausted.

In like manner the policy of the law of England, as in India, is to preserve to the citizen his right to have recourse to a Court of law for the purposes under consideration within such a time as the law of the land allows. The Indian legislature has followed that of England in placing upon its statute book an act<sup>2</sup> prescribing the period of time within which a person may agitate his grievances in a Court of law; the relative statute providing respective periods for various classes of litigation. Such a statute, conferring as it does upon one party to a contract a period within which he may bring his action, in so doing confers upon the other party the right not to be molested in that regard after the date when the prescribed period shall have run out.

The Indian Contract Act<sup>3</sup> makes void to that extent any agreement "by which any party thereto is restricted absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights".

The section expressly excepts contracts to refer to arbitration disputes which have arisen or which may yet arise. By the Specific Relief Act<sup>4</sup> a contract to refer to arbitration may be enforced by a decree for specific performance. The Specific Relief Act, however, is not

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<sup>1</sup> Act IX of 1899.

<sup>2</sup> Indian Limitation Act IX of 1908.

<sup>3</sup> Sec. 28.

<sup>4</sup> Act I of 1877.

everywhere in force in British India. In districts where it is not in force, a contract to refer to arbitration may be enforced under the Contract Act itself.<sup>1</sup>

The true extent to which the words of the section could be applied, and an accurate construe of them, have raised, from an early date after the passing of the Contract Act, points of some nicety. So early as 1876 Garth C. J., in *Coringa Oil Co., Ltd. v. Koegler*, 1 Cal. 466 ruled that if a contract were to contain a stipulation that no action should be brought upon it, that stipulation would be void; but that if a contract were to contain a double stipulation to the effect that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a Court of law, the first stipulation would be valid, as not hit by the section; whilst the second stipulation would be void, in that by it the jurisdiction of the Court would necessarily be excluded. The same case decided that a contract whereby it was agreed that all disputes should be referred to two arbitrators whose decision should be final, does not come within the mischief of the section. The student needs to follow with some care the distinction thus drawn. To agree to arbitrate and at the same time to agree to accept the arbitrator's decision is not to enter into a void contract; because the parties are not thereby *absolutely* restricting themselves from having recourse to law, e.g., in the case of the arbitration proceedings breaking down, or where the arbitrator, as such, acts illegally. The other stipulation to which reference is made above, namely, that neither party should enforce his rights in a Court of law, would, if allowed, prevent both the contracting parties not only from having a dispute otherwise adjudicated upon, if the arbitration proceedings broke down, but from questioning the propriety of anything done in connection with those proceedings.

Even nicer questions arose as to contracts which sought to regulate the time within which a party might seek to enforce his rights under the contract. In clearing up difficulties on this head certain contracts of insurance came up for scrutiny. Thus in *South British and Marine Insurance Co., Ltd. v. Brojonath Shaha*, [1909] 36 Cal. 516, a policy of marine insurance contained a condition that no suit by the assured would be sustainable in any Court unless instituted within six months after the loss; and further, that if any suit was commenced after the expiration of six months, the lapse of time should be taken as conclusive evidence against the validity of the claim. Neither of the parties to the suit invoked the aid of section 28 of the Contract Act, and the Court itself made no reference to its provisions. It was held, however, that the assured was bound by the terms of this particular stipulation and that as the suit had been instituted after the time agreed upon, it must fail.

Three years later the case of *Hirabhai v. Manufacturers Life Insurance Co.*, [1912] 14 Bom. L.R. 741 came up for decision. In that case the contract contained a clause worded as follows: "No suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues." That case went to the Court of appeal where the learned Judges considered themselves entitled to read the stipulation with special reference "to the objects and exigencies of insurance" and to hold that although in form a stipulation of such a kind appeared to limit the period within which a suit could be brought to enforce rights under a policy, in substance it amounted to a waiver of the assured's right, subject to the condition.

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<sup>1</sup> Sec. 28, Exception No. 2.

The distinction is a real if a fine one, and was elaborated in *Baroda Spinning and Weaving Co., Ltd. v. The Satyanarayan Marine and Fire Insurance Co., Ltd.*, [1914] 88 Bom. 344, where, however, views in disagreement with the decision come to by the Judges in *Hirabhai v. Manufacturers Life Insurance Co.* were expressed. The distinction between the clause in *Hirabhai's* case and that which fell to be construed in the *Baroda Spinning* case is well illustrated by the last-named decision. There the clause read " . . . or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection . . . all benefit under the policy shall be forfeited." A passage from the judgment of Bachelor J., at p. 355 appears to us to express the real distinction with clarity. After referring to the language of section 28 of the Contract Act the learned Judge proceeded as follows: "As I understand the argument for the appellants, the learned Advocate-General, while admitting—what has often been decided—that the Indian Limitation Act operates in such a case as this not to extinguish rights, but only to bar remedies, contended that for the purposes of this appeal we should look rather to the substantial effect intended by the section than to the precise form of words which the Legislature has used. The argument was that, however valid and important in law be the distinction between the barring of a remedy and the extinguishment of a right, yet to the man of business it is much the same thing whether his right be gone or the remedy for enforcing the right be barred, and it was urged that in substance and effect there was no appreciable distinction between saying 'I agree that upon the expiry of three months after the rejection of my claim, my rights shall be forfeited', (as is said here) and saying 'as to the time within which I may enforce my rights, I agree to limit it to the period of three months, after the rejection of my claim'; and this latter covenant would undoubtedly be void under the section. In my opinion, however, the distinction, which beyond question exists, is vital in the construction of the section. As I understand the matter, what the Plaintiff was forbidden to do<sup>1</sup> was to limit the time within which he was to enforce his rights; what he has done<sup>2</sup> is to limit the time within which he is to have any rights to enforce; and that appears to me to be a very different thing. This seems to have been the view which was tacitly accepted by the Calcutta High Court in *South British Fire and Marine Insurance Co. v. Brojo Nath Shaha*, [1909] 36 Cal. 516 though it must be admitted that that decision is of no direct assistance, since the question of the effect of section 28 of the Contract Act on such agreements was not expressly considered." It was, however, considered in *Giridharilal Hanumanbux v. Eagle Star and British Dominions Ins. Co.*, [1927] 27 C.W.N. 955 and the same view taken of its provisions. Forfeiture clauses of the kind dealt with in the *Baroda Spinning* case were held valid in *Burmah (Rainey v. Burmah Fire & Marine Ins. Co.)*, [1925] 3 Rang. 383 and *Univereal Fire & Gen. Ins. Co. v. Japan Cotton Trading Co.*, [1927] 5 Rang. 208 and all the foregoing authorities were considered and the distinction made by them accepted by the same Court in *Ghose v. Reliance Ins. Co.*, [1933] 11 Rang. 475.

It is to be observed, however, that if parties to a contract, instead of attempting to restrict the period within which a suit might be instituted to something less than that allowed by the law of limitation, were to agree to an *extension* of that period, a stipulation to such an effect would

<sup>1</sup> By sec. 28 of the Contract Act.

<sup>2</sup> By the terms of the agreement.

not be hit by the words of section 28, but would, nonetheless, be void under section 23, as tending to defeat a provision of law, i.e., what is laid down in section 3 of the Limitation Act in these words: "every suit instituted after the period of limitation prescribed shall be dismissed, although limitation has not been set up as a defence."

**Sources and Principles of Insurance Law.**—In England the law relating to insurance has begun to be codified. The position is very different in India. Apart from a few sections in the Indian Insurance Act, 1938 and from certain isolated provisions in other Acts which only incidentally impinge upon the topic of insurance, such contracts have to be construed according to the general law of contract, which, as we have seen, though itself the subject of particular enactment is not even now wholly codified. In consequence, we must, to a large extent, look to judicial decisions; and we shall find that the Courts in India recognize the same sources of insurance law as English jurists have long recognized, and that contracts of insurance in India, save where some express provision of law otherwise compels, are decided upon principles which have long commended themselves to English judicial opinion.

The more modern English statutes represent, however, an attempt in some measure to improve upon mere judge-made law. So far, then, as the English codes go beyond express judicial authority, they can afford but limited guidance to Courts in India, which have the duty, first to look to the statute law of the land, and then to implement the intention of that law to the extent only which authority permits.

How the law relating to insurance in India is shaped with reference to particular classes of insurance business will form the subject of the later chapters of this treatise.

## CHAPTER III

# THE CONTRACT OF INSURANCE UNDER ITS SPECIAL LAW

1. Preliminary. 2. Indemnity:—in the Law of England—as defined in the Contract Act—English doctrines followed—rights of promisor—rights of promisee—Indemnity or Guarantee—Fidelity Guarantee, an example—A border-line case—contracts of Indemnity or Guarantee are contingent contracts. 3. Guarantee:—defined—distinguished from indemnity—guarantees, general or special—continuing guarantee—liability under consideration—insurance having attributes of a contract of guarantee—Full disclosure, how far obligatory—Avoidance of the guarantee—Discharge of the surety—Co-suretyship—rights of surety to subrogate. 4. Insurable Interest:—defined—a species of property—subject and enjoyment of interest—Honour policies, so-called—*p.p.i.* contracts in India—ostensible interest in illegal insurances. 5. Subrogation:—origin of the notion—modern usage—doctrine applied in India—subrogation in the law of insurance—practical application of the doctrine. 6. Contribution. 7. The Policy:—interim protection. 8. The Premium:—mode of payment—Forfeiture—power of Agents in the matter of Waiver—return of premium—recovery of premium disallowed. 9. Assignment and Nomination:—Transference of rights under policies—Marine Insurance—statute law in India—effect of assignment—nomination. 10. Risk and Loss. 11. Rule of Good Faith.

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### 1. Preliminary.

The preceding chapter sought to summarise those elements of the law of contract in British India which in a general way affect a contract of insurance properly so-called.

It is the aim of the present chapter to describe those features of a contract of insurance which give to it its distinctive character. And inasmuch as it is the function of every contract to establish a right or rights to some benefit under it, while at the same time imposing some corresponding liability, we must include as materials for discussion a statement indicative of the limits within which such benefits may be enjoyed and such liabilities enforced. Finally, as the present chapter is primarily intended rather as an aid to the student and the commercial reader than as offering guidance to the trained legal practitioner, an effort is made to present the discussion of such matters as Indemnity, Guarantee, Insurable Interest, Assignment, Subrogation and Contribution in language as untechnical as is consistent with clearness.

Behind those common features which make any contract of insurance easily recognisable for what it is, lie others peculiar to the class or type of insurance business which the particular contract is designed to subserve. We shall find commercial necessity to have evolved for every class of insurance business an appropriate type of special contract. As, however,

the object of this chapter is to state and explain the common characteristics of all insurance contracts, the reader will be referred to later chapters of this treatise for a discussion of the more specialised forms.

## 2. Indemnity.

In its original conception the contract of insurance was one of indemnity. Gradually, however, other kinds of agreement were devised by which persons could be "assured" in the matter of future events in a manner not wholly within the accepted definitions of indemnity. Thus, a policy of marine insurance, in its inception, was a contract of indemnity, and is so still. But it was for long a matter of debate whether a policy of life assurance was a contract of indemnity. Many examples of insurance against accidents do not constitute, strictly speaking, contracts of indemnity; while, though generally so, fire and burglary insurance policies are not necessarily contracts of indemnity in the strict sense. In short, it will depend upon the precise terms of the policy in every individual case whether in contemplation of law it is to be construed as a contract of indemnity or not. It will be well, therefore, to discuss this notion of "indemnity" which is so intimately connected with the law relating to policies of insurance.

The word "indemnity" by derivation expresses the notion of "saving from loss".<sup>1</sup> So, by a contract of indemnity a person assumes a liability to make good some other's loss.

**The Contract of Indemnity in the law of England.**—An indemnity, as a term of art,<sup>2</sup> expressive of a contractual obligation has been defined as "a contract, expressed or implied, to indemnify against a liability and the liability under which is coterminous with the liability it is intended to cover, and is independent of the question whether somebody else makes default or not".<sup>3</sup> (*Pontifex v. Foord*, [1884] 12 Q.B.D. 152.) In less technical language this means that some one promises for a proper consideration to take upon himself a liability coterminous with someone else's liability to a third person, i.e., no more and no less than whatever that liability to the third person amounts to.

The above is a definition derived from English case-law. We shall shortly contrast it with the definition which finds a place in the Indian Contract Act. But before doing so it may be well to mark certain features of the former definition. We note that the obligation to indemnify may be not merely expressed (as, for instance, by a legal instrument) but may be implied from the nature of certain transactions in which the parties are interested: that is to say it may emerge, perhaps, as an equitable duty arising from a particular relationship. An extreme example of an implied contract to indemnify may be given for illustrative purposes only. In *Sheffield Corporation v. Barclay, etc.*, [1905] A.C. 392, it was said in the House of Lords that where a person invested with a

<sup>1</sup> The word is derived from two latin words *in* and *damnum* suggesting opposition to loss, out of which eventually emerges the late latin word *indemnitas* of which our English "indemnity" is the equivalent.

<sup>2</sup> By "a term of art" is meant a word, or sometimes a phrase, conceived as having a precise and constant meaning for jurists. In that sense it has a technical as opposed to a merely popular or colloquial meaning.

<sup>3</sup> See also *Cotton v. Bennett*, [1884] 26 Ch.D. 161; *Speller v. Bristol Steam Nav. Co.*, [1885] 13 Q.B.D. 96; *Carahore v. N.E. Ry.*, [1885] 29 Ch.D. 344; *Birmingham Land Co. v. L. & N.W. Ry.*, [1892] 34 Ch.D. 272.

statutory or common law duty had, in the exercise of that duty and on the request, direction or demand of another, and without any default on his own part, incurred a liability to third parties there was implied by law a contract, on the part of the person making the request, to indemnify the person having the duty or the supposed duty, against any liability which might result from its exercise. A common example of an implied promise to indemnify is presented, as will be seen later, by any contract of guarantee. For in every such contract the law implies a promise by the principal debtor to indemnify the surety.

The other feature to be noted in the foregoing definition is that the liability which the indemnifier undertakes to shoulder is wholly unqualified in the matter of origin.

**Indemnity as defined in the Contract Act.**—In section 124 of the Indian Contract Act a definition of indemnity is set forth in these words:—

“A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.”

It will immediately be noticed that this definition is much narrower than the notion of a contract of indemnity as expressed in the English decisions, confining, as it does, the loss which is intended to be made good, to loss arising from human conduct in some shape or form. Were this definition to be regarded as exhaustive in India, a contract of marine insurance for instance, being, as it is, essentially an undertaking to indemnify for losses incidental to marine adventure (among which are perils of the sea), would not constitute a contract of indemnity in the law of India. The commercial reader will easily call to mind a whole host of other risks, commonly insured against, which would be contracts of indemnity under the English definition, but which would be excluded from the definition of a contract of indemnity under section 124 of the Indian Contract Act.

It has, however, been already pointed out that the Indian Contract Act is not exhaustive of the whole law of contract.<sup>1</sup> And it is submitted that neither section 124 nor section 125 is to be regarded as exhaustive of the particular topics to which they refer. It will indeed be shown hereafter that the Courts in India have construed contracts of indemnity according to English canons of construction—apart altogether from these two sections of the Contract Act—where to do otherwise would make it impossible for the Courts to give effect to the plain intention of the parties, or would violate principles of equity which are now part of the accepted law of the land. This English concept of a contract of indemnity as including promises on the part of the promisor to save the promisee from losses occasioned by events not necessarily dependent upon human conduct, is essential to a true definition of a large number of modern contracts of insurance; and, as already pointed out, is a concept fundamental to the proper construction of a policy of marine insurance. Though in an academic sense, as certain learned commentators have pointed out, it is true enough that the description of a contract of insurance as a kind of contract of indemnity is to use language which, since the Contract Act, sounds “improper” in India,<sup>2</sup> Indian Judges have

<sup>1</sup> See p. 17, *ante*.

<sup>2</sup> Pollock & Mulla, *op. cit.*, 6th Edn., p. 463.

shown no disposition to confine their construction of contracts of insurance within any such narrow bounds.

**English doctrines followed.**—The Contract Act is silent as to the moment when the liability of an indemnifier attaches. The old view in England was that there was no "loss" until the promisee had paid; and therefore that the promisee could not lawfully make demand on the promisor till that implied condition should have been fulfilled. Such is the doctrine underlying the decision in *Collinge v. Haywood*, [1839] 9 A. & E. 633. But since, at any rate, the judgment of the Court of Appeal in England in *Liverpool Mortgage Insurance Co.'s case, In re. Law Guarantee Trust & Accident Society, Ltd.*, [1914] 2 Ch. 617, a more equitable view has prevailed; and the modern doctrine may be thus expressed in the words of the judgment in that case:—

"To indemnify does not merely mean to reimburse in respect of monies paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given", for "if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance."

It would seem to follow, then, that a good actionable claim by a third party against the promisee will, in the view of equity, be sufficient to entitle the promisee to immediate indemnification on the part of the promisor and, apparently, for the full amount of the claim; although, ultimately, an adjustment may have to be made upon the basis of the actual loss suffered.<sup>1</sup> So much then, for the case where there is no more to be considered than the mere liability to indemnify. Different considerations, however, will apply where, as pointed out by Buckley, L.J., in the same case "the party giving the indemnity is concerned with the application of the money which he pays".

It was the principles thus laid bare in the *Liverpool Mortgage Insurance Company's case* to which Lord Williams, J., in the recent Indian case of *Ooman Jamal & Sons, Ltd. v. Gopal Purshottam*, [1928] 56 Cal. 208, had recourse. It was there held that a material part of the controversy fell within the category of cases where the party giving the indemnity was concerned with the disposal of the money which he paid. The student will find that without the application of these English doctrines to which attention was drawn in that case, justice could not have been done between the parties. That was also an example of a case where the position of a promisor needed to be defined in law and his rights (if any) protected.

**Rights of Promisor.**—The Contract Act is curiously silent as to the rights of a promisor. The promisor (i.e., the indemnifier) in a contract of indemnity is particularly under the protection of Equity. As was observed by Jardine, J., in *Maharaja Shri Jaswatsingji v. The Secretary of State for India*, [1889] 14 Bom. 299, 303, "The principle which counsel for the plaintiff asks us to apply is that 'well-known principle of law,

<sup>1</sup> In *Chiranjil Lal v. Naraini*, [1919] 41 All. 395, the Court held that a cause of action arose against the promisor the moment the decree had been passed against the promisee. The Court did not expressly decide whether the liability under the Contract of Indemnity might not have attached earlier.

that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss' . . . . The Indian Contract Act in section 141 applies this principle to the contract of suretyship: but sections 124 and 125, which deal with the contract of indemnity, are silent on this point: only the rights of the promisee are stated; those of the promisor are not mentioned. Counsel for the plaintiff did not notice this omission when arguing for the application of the doctrine of subrogation. In the absence of reported decisions, I am of opinion that the doctrine is to be applied for the following reasons. It is an essential part of the law of indemnity. It is clearly based on natural equity and is thus of general application. The Indian Contract Act does not impair it, and is itself only a partial measure, as the preamble shows."

The judgment from which the foregoing passage is quoted, was pronounced, it may be noted, seventeen years after the Indian Contract Act had come into operation.

It may therefore be said as a generalization that the rights of a promisor under a contract of indemnity are at least analogous to the rights of a surety under a contract of guarantee as the same are declared in section 141 of the Indian Contract Act. We shall see in rather more detail what that amounts to in discussing the latter section in relation to the topic of guarantee. It will suffice, perhaps, for the moment, to observe that where the liability of the promisee to the third party is in any way met by a security in the hands of that party, or is susceptible of being set off against some debt or actionable claim respectively due to or enforceable by the promisee against the third party, there arises an equitable right, available to the indemnifier, to the benefit of anything of that nature which ensures to the person he has undertaken to indemnify. Putting the matter in less technical language, this right is one entitling the indemnifier to stand in the shoes of the person he has agreed to aid; from which it follows that if he has so undertaken another man's burden, he must at least have the benefit of every circumstance which will make that burden lighter. Reduced to the simplest illustrative terms, where the loss against which a party has agreed to indemnify another, might at first sight seem to involve the indemnifier in a payment of (say) Rs.1,000, this sum would be reduced to no more than Rs 500 if there was an enforceable debt of a like sum from the third party owing to him who is to enjoy the contract of indemnity. This right is made available to the indemnifier by what jurists call "the doctrine of subrogation". This is discussed below.<sup>1</sup>

**Rights of the Promisee.**—The rights of the promisee under a contract of indemnity when sued by the third party have been long crystallized in England. Included is the power to bind the promisor by the judgment in the suit against the promisee out of which the claim to be indemnified arises. In 1615 there was decided in England the leading case of *Lampleigh v. Brathwaite* (Hob. 105; 1 Sm.L.C. 141) from which a number of doctrines have been deduced. Among them, is the rule that the promisor cannot re-agitate the merits of the suit which the third party has brought to judgment against the promisee. And this rule holds although the promisor was no party to that suit. (See *per Mellish, L.J.*,

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<sup>1</sup> See p. 72, *post*.

in *Parker v. Lewis*, [1873] 8 Ch.App. 1035, 1059.) This rule has been applied in India. (*Nallappa v. Vridhachala*, [1914] 37 Mad. 270.)

These English doctrines as to the rights of an indemnity-holder, when sued, plainly account for the language of section 125 of the Indian Contract Act, which is in these words:—

“125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.”

**Indemnity or Guarantee.**—There are sometimes contracts (depending for their utility upon an undertaking by one person to relieve another of a liability) which, though cast in language appropriate only to one type of contract, may yet in contemplation of law, belong not to that but to some other. Such an arrangement may wear the appearance of a contract of guarantee when in reality it should be classed as one of indemnity. The distinction is much clearer in the law of England than it would be in India, if the definition of a contract of indemnity appearing in sec. 124 of the Indian Contract Act were exhaustive: for, in England a contract of guarantee is impossible without bringing at least three persons into juridical relationship. As will be seen hereafter, these are the creditor, the debtor, and the guarantor (styled the surety). In a contract of indemnity, as the same is understood in the law of England, the only relationship established is one between the indemnifier (the promisor) and the person indemnified (the promisee). Thus, it was decided in *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885, that a promise to be primarily and independently liable is not a guarantee, though it may be an indemnity.

Accordingly, it is not the mere use of the word “guarantee” in a policy which brings the contract within that category. A good example of the way in which the use of the word “guarantee” may mislead, and give rise to an ingenious but unwarranted defence, is presented by the case of *Dane v. Mortgage Insurance Corporation*, [1894] 1 Q.B. 54. The facts were simple. A lady held a fixed-deposit receipt in a colonial bank. A fortnight before the money was repayable, the bank failed. She had taken out a policy with the defendants wherein, after the usual recitals, appeared these words:—“The Corporation (i.e. the Insurers) do hereby guarantee to the assured the payment of the said principal sum of £1,000 and interest in manner following . . . . The Corporation will pay to the assured the said principal sum if the debtors shall have made default in paying the same . . . .” On the bank stopping payment the lady claimed the money from the insurers. While the insurers

were considering her claim a scheme of arrangement was arrived at, (compulsory under the particular colonial law), by which the plaintiff was allotted shares in a new concern which was to take over the assets and liabilities of the bank. At the trial of the action, the defence was that this was a contract of suretyship or guarantee; that the shares taken in the new undertaking extinguished the debt; and that thereby the surety (i.e. the Insurance Corporation) was discharged from its liability. Lord Esher, M.R., would have none of this. He regarded the contract not as one of guarantee at all, but as a contract of insurance of a kind to be classified as a contract of indemnity. "The policy" said he "is not a guarantee that the bank will be able to pay; it is a positive direct contract that, if the bank does not pay a certain amount on a fixed day, the insurance company will pay that amount . . . . If the bank had not failed, but had remained in perfect credit, and it had on some untenable ground refused to pay the plaintiff at the time when, according to the deposit note, payment was due, the plaintiff would not be bound first to sue the bank; the policy is made for the very purpose among others of preserving her from that necessity: she would be entitled to receive payment from the defendants, the insurers; but then, if, after they had paid her, the bank, discovering their mistake, were to pay her the amount of the deposit, she would be bound to account for it to the defendants; or, on the other hand, if the bank still refused to pay, she would be bound to allow the defendants to sue in her name."

In the above passage the then Master of the Rolls sufficiently describes the incidents of an insurance policy having the characteristic features of a contract of indemnity. And in so doing he has concluded with a reference to a doctrine which will receive more detailed treatment towards the close of the present chapter—that of subrogation.

Other lessons quite as useful to the student of insurance law are to be learnt from the same case. Kay, L.J., looked at the matter of substance from yet another angle. He met the arguments of the defence as to the effect of the scheme of arrangement with the bank's creditors by referring to two well-known cases, *Slater v. Jones*, [1873] 8 Ex. 136, and *Ex parte Jacobs*, [1875] L.R. 10 Ch. 211, as deciding that arrangements which might bind creditors or discharge debtors by operation of law do not necessarily discharge a surety; and he went on: "assuming that this contract was a mere contract of guarantee, or suretyship, it seems to me that a default did occur within the meaning of the contract, and therefore that a right of action vested in the plaintiff to which what occurred afterwards affords no kind of defence".

This judgment presents a good example of how to construe a contract with reference to what it discloses as to the intention of the parties. That intention being plain, namely, that the insurer would pay, made it immaterial in the particular state of facts, whether the contract were to be classified as one of indemnity or of guarantee.

**Fidelity Guarantee, an example.**—The principles enunciated in the two preceding paragraphs are further illustrated by that class of insurance business which is designed to cover an employer's loss through the dishonesty of some person he employs. In commercial circles what is thus sought to be achieved is often spoken of as the obtaining of a "Fidelity Guarantee". This type of business, so far as it is undertaken by those who hold themselves out as insurers, will fall to be discussed in more detail hereafter. For the moment it may suffice to point out that a policy taken out for such a purpose, though colloquial usage

treats it as a guarantee, is, in contemplation of law, a contract of indemnity. Thus the assured can gain no more than the amount of his actual loss, no matter what sum may be mentioned in the document relied upon. So, too, where the assured is so circumstanced as to be able to recoup himself from any source which the defaulter might draw upon, the insurer (as the indemnifier) enjoys the same rights, under the doctrine of Subrogation. Upon this principle the insurer may deduct from the claim made against him all unpaid salary, wages or commission which the assured may have retained, and is liable only for such balance on the contract as is left uncovered by this appropriation of moneys due to the defaulter.

It often happens that an employer seeks to cover his risks by insuring with more than one insurer in respect of the same servant. And where this is the case, an insurer against whom a claim is subsequently made may have the benefit of any other policy of insurance or of any other guarantee properly so called. This he may do either by an application of the doctrine of Subrogation, or by what is called Contribution, the effect of which, as we shall see hereafter, is to apportion a loss so covered by several insurers rateably among them. See the decisions in *American Surety Co. of New York v. Wrightson*, [1910] 103 L.T. 663 and *Employers Liability Assurance Corporation v. Skipper & East*, [1887] 4 T.L.R. 55.

For the student it is important to remember that the equitable doctrines of Subrogation and Contribution are available to an insurer wherever the terms of the policy exhibit a contract which in contemplation of law amounts to one of indemnity.

**A Border-line case.**—In England the necessity of determining whether the terms of a contract shew it to be one of guarantee or of indemnity often arises also from the need of knowing whether the particular agreement is, as English lawyers say, "within the Statute of Frauds"; for contracts which are within that statute must be in writing.

It often happens that unwary persons imagine they have a guarantee when in fact they have not. Sometimes the evasions to which such circumstances give rise succeed, and sometimes they fail. Witness the case of *Guild & Co. v. Conrad* mentioned above. Everything in that case turned upon whether the promise made was in the nature of an indemnity; for if so, it would not be within the Statute of Frauds and so might be entered into verbally: or, whether, on the other hand, it was a guarantee, in which case the defendant would avoid his liability. The facts were these. The defendant was a partner in a mercantile firm, which desired to draw upon the plaintiff firm. The defendant gave a guarantee in writing to the extent of £5,000 in consideration of the plaintiff allowing the defendant's firm to draw. When the firm's overdraft had exceeded £4,000 the plaintiff declined to continue taking up their bills. Thereupon the defendant verbally undertook to provide funds to meet a succession of bills. The action was brought to recover sums of money representing the amount of three such bills. The defendant denied that he had given any promise either of guarantee or indemnity. The jury found, as of fact, that he had verbally undertaken to provide funds to meet two of the bills in suit. It was thus left to the Judge to decide what remedy in law (if any) the facts found gave to the plaintiff. The Judge decided that the promises were not in the nature of guarantees and so need not be in writing, and he gave judgment for the plaintiffs. On appeal, Lindley, L.J., in delivering the unanimous

judgment of the Court described it as a "border-line case". The distinction made in the judgment is a real, if fine, one. "It was said that the contracts were conditional upon the failure of the firm to meet the bills. But I am inclined to think that the defendant did promise that if the plaintiff would accept the bills of the firm he would take care that they were met, and that the plaintiff accepted the bills on the faith of that promise; if that were so the defendant was primarily responsible and the promises amounted to promises to indemnify, and were not merely guarantees."

**Contracts of Indemnity or Guarantee are contingent contracts.**—Contracts of indemnity as also those of guarantee belong, of their very nature, to that large class which under the general law of India is styled "contingent contracts"<sup>1</sup>; for it is on the happening of a particular future event, or "contingency", that the obligation to perform the contract arises. When the event shall have occurred lawyers say the liability "attaches".

### 3. *Guarantee.*

The Indian Contract Act has placed in the same chapter, Chapter VIII, the allied topics of indemnity and guarantee. It may be said that a closer association of the two ideas was then in mind than need today be adhered to. The features which distinguished the one kind of contract from the other were not always so clearly marked as now they are. Yet even so recently as 1925 a bench of the Madras High Court<sup>2</sup> found a good deal to dissent from in a judgment, then scarce 10 years old, concerning the true construction and import of sections 140, 141 and 145 of our Act.

The notion of guarantee or suretyship is an old one. The first of these two words was for long more commonly written "Guaranty", conveying to the eye as to the mind the historical truth, already remarked upon,<sup>3</sup> that it is in point of derivation not far removed from the original notion of "Warranty".

In the Indian Contract Act the word is spelt "Guarantee". To the Indian student the particular meaning assigned to the word so spelt may perhaps seem surprising, if not rather confusing, having regard to the meanings respectively assigned to such words as *donor* and *donee*, *mortgagor* and *mortgagee*, *promisor* and *promisee*; while the commercial reader will, as naturally, recall the familiar use of the words *drawer* and *drawee* in connection with a bill of exchange. Such readers might expect to find the word guarantor used of the person who gives the undertaking, the undertaking itself to be called the guaranty, while the person in whose favour it is granted, named the guarantee. But the fact is that in the Indian Contract Act the word guarantee is not used of any party to the contract, but refers solely to the undertaking itself. This involves another kind of nomenclature to describe the parties to the agreement.<sup>4</sup>

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<sup>1</sup> See p. 41, *ante*.

<sup>2</sup> This case is referred to in more detail on p. 58, *post*.

<sup>3</sup> See p. 38, *ante*, n. 3.

<sup>4</sup> The particular nomenclature used was, in fact, no novelty when the Contract Act was framed. It is reasonably clear that the word "guarantee" on the lips of lawyers has in the past represented no more than an attempt to get a little closer to the French "*garantie*".

**The Contract defined.**—The definitive section of the Contract Act is section 126, and is in these words:—

"A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

The expression "principal debtor" is not without significance, since it is a primary obligation on the part of some one else which the surety in a secondary capacity undertakes to answer.

It is important to observe that the agreement come to is essentially *tripartite*. It has long been settled in England that a person cannot make himself the creditor of another by volunteering to discharge the obligation of the other, and that the rights of the surety against the principal debtor can only arise where the suretyship has been undertaken at the request, actual or constructive, of the principal debtor. Accordingly, to make an effective contract of guarantee there must be concurrence between the three parties named in the definition.

It has been said that a person may become a surety without the knowledge and consent of the principal debtor. (*Muth Raman v. Chinna Vallayam*, [1916] 39 Mad. 963.) But it is submitted that the true view has been expressed by the learned Judges who decided the case of *Periamanna Marakkayar v. Banians & Co.*, [1925] 49 Mad. 156: A.I.R. [1926] Mad. 544. "I think that the Contract Act draws a distinction between contracts of indemnity and contracts of suretyship, and that contracts of suretyship, unlike contracts of indemnity, require the concurrence of three persons, namely, the principal debtor, the creditor, and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor. Reading sections 126 and 145 together, it seems to me that there can be no contract of guarantee as distinguished from a contract of indemnity unless there is privity between the principal debtor and the surety, as it is difficult to speak of an implied promise between persons between whom there is no privity of contract. Section 126 refers to a contract of guarantee and speaks of three persons with reference to that contract, namely, the person who gives the guarantee, the person in respect of whose default the guarantee is given, and the person to whom the guarantee is given. Section 127 refers to consideration for the guarantee which is sufficient to support the guarantee. *Nanak Ram v. Mehin Lal*, [1877] 1 All. 487 is an authority for the view that privity is necessary in all cases of suretyship between the three parties. Sections 140 and 141 only prescribe the methods by which the rights of the surety can be worked out, and I find it difficult to see how a person who agrees to perform the obligation of another without reference to him, can clothe himself with the right of action against him on the contract, or how a person can become a surety without the knowledge and consent of the principal debtor and clothe himself with the rights mentioned in sections 140 and 141 or section 145. The English law is clear that no person who is not a party or privy to a contract can sue upon it . . . . I do not think that any difference was intended to be made in the Contract Act between the Indian and English law on the subject, and I see no reason to depart from the English law as to the necessity of a request, actual or constructive, of the principal debtor to the surety in order that there may be an effective contract of suretyship." *Per Kumaraswami Sastri, J.*

In expressly dissenting from the decision in *Mutuh Raman v. Chinna Vallayam* the same learned Judge regards sections 140, 141 and 145 of the Contract Act as referring not to contracts of indemnity but to contracts of suretyship. It is submitted that such is the correct view.

**Guarantee distinguished from Indemnity.**—As to the difference in principle between indemnity and suretyship, the Indian Act does not depart from the English law.<sup>1</sup> A writer in the *Solicitors Journal*<sup>2</sup> thus contrasts the two: "A Guarantee is a promise to another *qua* Creditor to secure the payment of a debt to him; whereas an Indemnity is a promise to another *qua* Debtor to secure the repayment of a debt payable by him."

**Guarantees, general or special.**—A guarantee may be categorised as either general or special: the first may be in respect of all debts, duties or obligations for which the principal debtor may be liable; while a special guarantee imports an obligation on the part of the surety limited to some specified debt or duty which it is sought to cover. It is a question of mixed law and fact whether the terms of the contract bring it within the one or other of the categories mentioned. In other words, the agreement has got to be construed by the Court if the matter be litigated. In England the document read as a whole will usually be the determining factor. In India, where the agreement may be effected orally, it might, in such a case, be a more difficult question to determine.

**Continuing guarantee.**—A guarantee, says section 129 of the Contract Act, which extends to a series of transactions is called a "continuing guarantee".

It is, of necessity, a question of fact to be determined by reference to the words of the contract, whether the contracting parties intended the guarantee to cover one transaction or a series. In England one has but to look at the instrument and apply the recognised methods of construction, the first of which is that in order to determine the intention of the parties the instrument must be read as a whole. Such too will be the normal way of determining the material fact in India; but, as the reader has already been reminded, contracts of guarantee or suretyship may be made orally; in which case the determination of what the parties meant will, if once litigated, fall to be decided largely upon oral evidence. Nevertheless, whether the agreement shall have been reduced to writing or not, the Court may look at all the surrounding circumstances in order to arrive at the fact. Accordingly there may turn out to be references to the intention of parties to an oral contract of guarantee to be found in documents such as letters or notes which would otherwise be independent of the controversy.

The student should note that the expression "series of transactions" appearing in the section means a number of transactions distinct in themselves but arranged in series. Thus it is not the element of time which here operates so as to bring a contract of guarantee within the concept of continuance. So the ordinary fidelity guarantee in respect of a named person is not necessarily a continuing guarantee (*Sen v. Bank of Bengal*, [1920] 47 I.A. 164); and where there was a guarantee for the payment of a sum certain within a definite time, though to be effected by a number of instalments, the guarantee was not regarded as

<sup>1</sup> Pollock & Mulla, *op. cit.*, 6th Edn., p. 467.

<sup>2</sup> 38 S.J. 577.

a "continuing guarantee". (*Bhagvandas v. Secretary of State*, [1926] 28 B.L.R. 662.)

Unlike an ordinary guarantee, a continuing guarantee may at any time be revoked by the surety, (but of course as to future transactions only) by notice to the creditor.<sup>1</sup> In other respects the circumstances under which a continuing guarantee may be revoked or the surety released from its operation are the same as are enumerated hereunder in the case of an ordinary guarantee.

**The Liability.**—The obligation which the surety undertakes is to "perform the promise, or discharge the liability" of the person styled the principal debtor. In order to appreciate the force of these words the student must remember that the expression "principal debtor" is the designation of that "third person" whose obligation the surety makes himself answerable for. It does not necessarily import any "debt" in the modern sense of money owing, but is to be understood as describing accurately one who "owes" a duty of some sort or other.<sup>2</sup> Secondly, the student should remember that as the obligation is to perform a promise or discharge a liability there must, in fact, have been a promise or a liability on the part of that third person for whom the surety undertakes to answer. If, in fact, there was no promise, or if in law there was no liability, when the surety ostensibly entered into the contract, the surety may avoid it. (See *Manju Mahadev v. Shivappa*, [1918] 42 Bom. 444, where it was found that the purported guarantee was for the payment of a debt then barred by limitation. The surety was accordingly held not bound.)

By section 128 of the Indian Contract Act, the liability of the surety is made co-extensive with that of the principal debtor, unless it is otherwise provided by the contract; i.e., unless the surety has expressly or by necessary implication limited the extent of his undertaking. The illustration appended to the section sufficiently shows the extent of an implied liability. A guarantees to 'B' the payment of a Bill of Exchange by 'C', the acceptor. The bill is dishonoured by 'C'. 'A' is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it. Contrast this with the case of *Maharaja of Benares v. Har Narain Singh*, [1906] 28 All. 25, where the guarantor who had assumed the obligation of paying rent was held liable for the rent only and not for any interest on the claim.

**Consideration.**—Like all other contracts, an ostensible contract of guarantee may fail for want of sufficient consideration. Section 127 of the Contract Act provides that anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. Some benefit to the principal debtor has been held indispensable: *Pestonji v. Bai Meherbai*, [1928] 30 Bom. 1407; A.L.B. [1928] Bom. 539. It is thus immaterial whether there is or there is not any apparent benefit to the promisor: *Sornalinga v. Pachai Naickan*, [1913] 38 Mad. 444. For, indeed, the Court may be said to assume that what the promisor has promised evidently struck him as something eminently worth his while. The Court cannot, it has

<sup>1</sup> See sec. 120 of the Indian Contract Act.

<sup>2</sup> The word "debt" derivatively signifies no more than something which a person "ought" to do. It derives from the Latin *debet*. The payment of money where money is due, being itself a duty is thus properly described as a debt.

been said, set up a standard of value for any particular promise, nor place itself in the position of assuming to make the parties' bargain for them. This is not to say that the nature of the bargain from the point of view of consideration is but casually or superficially to be regarded. On the contrary, the true nature of the bargain in a contract of guarantee needs to be determined with some precision, since anything in the direction of varying the terms of that bargain unless of a plainly trivial or immaterial nature will suffice to relieve the surety of his obligation.<sup>1</sup>

**Insurance having attributes of a contract of guarantee.**—A contract of guarantee may have the attributes of a contract of insurance in so far as the relationship between insurer and assured is concerned, yet may also have the characteristic attributes of a contract of guarantee in so far as the insurer's obligation to pay and his rights against third parties be concerned: *Seaton v. Heath*, [1899] 1 Q.B. 782; *Re Denton's Estate*, [1904] 2 Ch. 178; *Shaw v. Royce Ltd.*, [1911] 1 Ch. 138.

**Full disclosure, how far obligatory.**—An ordinary contract of suretyship is not within the rule as to *uberrima fides*. This means that while a misrepresentation as to a material fact may well suffice to avoid the contract, the relationship between the parties does not, so far as disclosure be concerned, go beyond what obtains in relation to all forms of contract in the matter of misrepresentation or fraud. It is otherwise if the guarantor be an insurer, and if the nature of the transaction be such as to constitute a recognisable form of insurance business. In that case, *uberrima fides* is as essential to the effective conclusion of the contract as it is in any other class of business where the relationship of insurer and assured obtains. It is well settled, on the other hand, that in a contract of the nature of an ordinary guarantee, if the surety requires personal knowledge of some particular matter, he must make it the subject of a distinct inquiry: *Hamilton v. Watson*, [1845] 12 Cl. & F. 109.

The Indian Contract Act makes an agreement of guarantee invalid if obtained without sufficient disclosure. The relative sections are sections 142 and 143. They may be read together and are in the following words:—

“142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.”

#### ILLUSTRATIONS.

“(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A, in consequence, calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.”

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<sup>1</sup> As to which see p. 63, *post*.

In the last edition of their treatise upon the Indian Contract and Specific Relief Acts to be edited by their hands, the late Sir Frederick Pollock and the late Sir Dinshaw Mulla observed of these two sections that "they were not very well fitted to exclude doubts whether they go beyond the English authorities or not". The last of the two sections referred to "might be read so as to impose on the creditor an unqualified duty of giving the surety full information of all material facts. But the words 'obtained by means of keeping silence' coupled with the fact that the illustrations are both taken with no substantial change, from English decisions, appear to limit the operation of the section to cases of wilful concealment which in fact amount to a misrepresentation of what the surety is undertaking."<sup>1</sup>

It is conceived, however, that the Courts in India in dealing with a contract of insurance, though it may partake of the nature of a guarantee, will follow the English decisions and enforce the principle of *uberrima fides*.

**Avoidance of the Guarantee.**—It follows from what has been said above that failure of consideration, fraudulent concealment, or the non-fulfilment of some condition precedent will entitle the surety to avoid the contract. An alteration in the terms of the instrument invalidates the contract: *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q.B. 75. The alteration according to the modern doctrine (particularly in England, in the case of a deed or agreement not under seal) must be material: *The Bishop of Crediton v. Bishop of Exeter*, [1905] 2 Ch. 455. Note, again, that the Indian Contract Act permits contracts of guarantee or suretyship to be made orally. An oral contract of insurance would certainly be novel, but is not impossible under the law of India. In such a case, and where the general character of the insurance effected was one of guarantee, an alleged alteration of its terms would manifestly not be too easy to establish. Alterations in the terms of the bilateral contract between the principal debtor and his creditor forms a topic belonging to the subject of Discharge and is so treated in this chapter.

**Discharge of the Surety.**—A surety's obligations may be discharged in a number of ways. The most obvious is, the occasion to do so having arisen, by making payment in accordance with the contract. Another, equally obvious, is by efflux of time, i.e., when the period contemplated by the contract has run out and no default has occurred during its currency. A third form of release is by revocation, express or implied. A proper instrument of guarantee should make some provision for its revocation by notice.<sup>2</sup> Where a creditor merely states his intention of forgiving or releasing a surety, the original contract is not determined. What is required is some "consideration", as understood in the law of contract, for the creditor so acting. In the absence therefore of a release recognised at law, equity will not intervene. It has been said that this state of things is an example of an application of the principle, often stated but not as often exemplified, that "equity follows the law". As to an implied revocation, *Lloyds v. Harper*, [1880] 16 Ch.D. 290, 307, decided, amongst other things, that if under a contract of guarantee,

<sup>1</sup> Pollock & Mulla, *op. cit.*, 6th Edn., p. 504.

<sup>2</sup> A notice to determine made pursuant to some such provision in the instrument merely operates *in futuro*. Any liability incurred prior to the receipt of the notice is thus not avoided by it.

given for the fidelity of a servant, a master continues to employ him with knowledge of an unfaithful act on the servant's part, the guarantee may be treated as *ipso facto* determined thereby, on the principle apparently that such conduct on the part of the creditor amounts to a revocation. Apart, however, from that equitable view of the matter, the surety himself may, if apprised of the default, give an effective notice determining his contract on that ground. It is well settled that a guarantee can be determined by waiver or abandonment before breach and even in England an agreement so to waive need not be in writing. This is as old as *Taylor v. Hilary*, [1835] 1 Cr. M. & R. 741.

Save to the extent indicated above as to determination of the contract by an express or implied revocation, none of the foregoing circumstances operating so as to discharge the surety create difficulties worth discussing in the present chapter. There are, however, a number of other grounds, all part of the settled law, as well of India as of England, any one of which has the effect of discharging the surety from his obligation and determining the contract of guarantee. The following may be said to represent the principal grounds, which, in addition to those enumerated above, have the effect of releasing the surety and determining the contract:—

- (i) A material variation or alteration of the terms of the principal contract, unless effected with the surety's consent.
- (ii) An enforceable agreement between the creditor and the principal debtor whereby the latter secures more time, if entered into without the surety's consent, will discharge the latter from his liability even if he suffer no prejudice thereby. Such an arrangement, however, is really but an example of an alteration in the principal contract, and is not, properly speaking, a separate ground for discharge.
- (iii) A surety is also discharged if the creditor and the principal debtor come to an agreement to give time to the surety himself: (*Oriental Financial Corporation v. Overend, Gurney & Co.*, [1871] 7 Ch. App. 142) for, it was said in that case, such an arrangement would have the effect of tying the creditors' hands from doing that which would throw the surety upon the principal debtor. (*Ibid.* at p. 152.)
- (iv) The surety is discharged by operation of law should the creditor effectively discharge a co-surety.
- (v) The death of the principal debtor before the latter's default has the effect of discharging the surety in any case where the debtor's own obligation dies with him.
- (vi) Loss of securities held by the creditor in respect of the guaranteed debt will, to the extent of their value, extinguish the surety's guarantee. This doctrine depends for its validity upon the surety's right of subrogation, of which mention has already been made in this chapter under the head of Indemnity. The genesis and development of the theory of subrogation is made the subject of further discussion hereafter,<sup>1</sup> and those sections in Chapter VIII of the Contract Act which, amongst other things, import the doctrine of Subrogation as applied to Guarantee will be found set out below.<sup>2</sup>

<sup>1</sup> See p. 72, *post*.

<sup>2</sup> See p. 66, *post*.

Of all the foregoing circumstances so operating as to release a surety from his guarantee those falling under the heads of variation and alteration of the terms of the principal contract need the student's closest attention. How far such grounds may avail a surety was a matter tolerably well settled in England when the Privy Council disposed of the case of *Ward v. National Bank of New Zealand*, [1883] A.C. 755. "A long series of cases", it was there said, "has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract the performance of which the surety had guaranteed." Again, in an earlier case, the rule had been thus stated by Lord Cottenham: "Any variance in the agreement to which the surety has subscribed which is made without the surety's knowledge or consent, which may prejudice him or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variants, be substantially performed, will discharge the surety." The oft-quoted words of Lord Lyndhurst in *Bonser v. Cox*, [1844] 13 L.J. Ch. 260 put the matter in a nutshell. The surety "enters into a particular and specific contract and that contract alone he is bound to perform". Prior to the framing of the Indian Contract Act, the principle underlying the foregoing rules had been qualified in one particular only. See *Skillett v. Fletcher*, [1866-67] 1 C.P. 217; 2 C.P. 469 and *Croydon Gas Co. v. Dickinson*, [1876] 2 C.P.D. 46, the effect of which is to lay down—what, after all, is no more than common sense—that where a surety has bound himself for the performance of a number of contracts or duties so distinct as to be clearly severable, a variance in one of those contracts or duties sufficient to discharge him *qua* that contract will not affect his liability in respect of the others.

The Indian Contract Act sought to give effect to these English doctrines in sections 133, 134, 135 and 139 of the statute. These sections read as follows:—

"133. Any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

The Act with equal clearness gives statutory sanction to a number of other rules, already well settled in England, indicating the limits within which a surety could or could not escape liability on the ground of conduct attributable to one or other of the remaining parties to the contract. These are to be found in sections 136, 137 and 138 which read as follows:—

"136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties."

Of the foregoing, the language of the first two sections re-states the settled law of England. That law, however, distinguishes the position of sureties jointly bound and sureties severally bound. Section 138 makes no such distinction. A release in terms of the section is thus available in India to any surety.

**Co-suretyship.**—As in indemnity, so in the law of guarantee, there is nothing to prevent a person seeking to provide himself with the means of meeting a possible or an expected loss by the help of more than one obligor. In ordinary private transactions co-sureties are indeed commonly met with. It is less usual in the case of insurers. In *MacVicar v. Poland*, [1894] 10 T.L.R. 566, a Banker's customer took out two guarantee policies from an insurance company and another similar form of protection with Lloyd's underwriters. The first two policies were to secure payment of the sum deposited by the customer, within 3 months of the bank stopping payment. The Lloyd's policy was intended to meet any loss consequent on the bank's failure, as also to cover the possibility of the insurance company going into liquidation. Both the events contemplated by the assured took place. The insurance company through their liquidator denied liability. The underwriters then repudiated the Lloyd's policy on the curious ground that the insurance company's defence was nothing to do with their insolvency, but rested upon a *bona fide* belief that it was not liable. The Court allowed the plaintiff to recover. It was not necessary to decide in that case a question which, as Macgillivray points out, may well arise in the case of multiple security by two or more insurance companies; namely, whether the other guarantors are co-sureties with the first, or whether the second or other obligation only arises upon the failure both of the debtor and of the first guarantor. "The distinction is of importance not only with regard to the primary liability of the second guarantor, but also upon the question of his right to be subrogated to the debt and the creditor's securities."<sup>1</sup>

By section 146 of the Contract Act the principle of Contribution between co-sureties is established as applicable to Indian contracts of guarantee. The section reads:—

"Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor."

It should be noted that co-sureties can contract out of contribution to the extent named. It must also be remembered that the right of one surety against another under the statute does not arise until the surety shall have discharged his own liability. The topic of Contribution is

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<sup>1</sup> *Insurance Law*, 2nd Edn., p. 1205.

dealt with more at large in the concluding portion of this chapter of our treatise.

By section 147 it is, however, provided that co-sureties bound in different sums are liable to pay equally as far as the limits of their respective obligations permit. The illustrations appended to that section (which it is thought need not be reprinted here) make it clear that the draughtsman meant what he wrote, and that consequently "equally" does not mean "rateably".

**Rights of surety to subrogate.**—As already observed rights of subrogation are given to those who enter into contracts of indemnity or guarantee. This is the result of a long chain of decisions in England the underlying principle of which is equitable in origin. For the genesis of the doctrine, the reader is referred to a later part of this present chapter. In that part of our Contract Act which concerns itself with the law relating to guarantee, the principles of subrogation as applicable to sureties are specially enacted in sections 140, 141 and 145, which may be read together, and are in terms as follows:—

"140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully."

#### 4. *Insurable Interest.*

Perhaps one of the most important facts for the student of insurance law to remember is the relation between the concept of an Indemnity and that of an Insurable Interest. This may be expressed by saying that the indemnity cannot extend beyond that interest. What then is meant by an "insurable interest"? Before, however, studying the following *dicta* by which in a general way the concept of an insurable interest has been sought to be defined,—and wherein he will look for his answer to the question propounded—the student may be reminded that for each class or type of insurance he must be prepared to find a special and an appropriate definition whereby, for the relative class of contract, the right to the policy is to be tested.

The doctrine of "insurable interest" emerged into prominence during the latter half of the 18th century in England, when, because of the growth of wagering contracts, made under colour of insurance business, much damage was being done to genuine insurance undertakings; while even the safety of individuals had become manifestly imperilled. This state of things was sought to be remedied by the statute 14 Geo. III,

c. 48, the preamble to which and the operative portion read as follows:—

“Whereas it hath been found by experience, that the making insurances on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: For remedy whereof, be it enacted, etc. . . . that from and after the passing of this Act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming and wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.”

By the introduction of the notion of some specific, though as yet undefined, “interest” as the foundation of a right to insure, and so as to escape the mischief of this statute, the character and degree of such “interest” became the test by which insurance contracts recognisable by law were to be distinguished from mere wagering contracts, henceforward under a statutory prohibition. The application of such a test affected every branch of insurance business then known to the City of London; while from the necessity of so testing contracts purporting to be contracts of insurance, arose the doctrine of “insurable interest” as we know it today the world over.

**Insurable interest defined.**—It was Lord Blackburn in *Wilson v. Jones*, [1867] 2 Ex. 150, who stated that he knew of no better definition of an interest sufficient to support a contract of insurance than one associated with a judgment of Lawrence, J., in the early case of *Barclay v. Cousins*, [1802] 2 East 546, namely that “if the event happens, the party will gain advantage, if it is frustrated he will suffer a loss”. But it chanced that Lawrence, J., was greatly to improve on this definition in a classical judgment which he pronounced in another case some four years later. This is the case of *Lucena v. Craufurd*, [1806] 2 B. & P. N.R. 269 at 301, where that learned Judge more comprehensively defined an insurable interest as “the having some relation to, or concern in, the subject of the insurance, which relation or concern, by the happening of perils insured against, may be so affected as to produce a damage, detriment, or prejudice, to the person insuring: and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be ‘interested in’ the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence,—prejudice from its destruction”.

No definition of an insurable interest is to be found in the Indian Contract Act; while the Insurance Act, 1938, is equally without any general definition, though, as will be noticed in its proper place, the limits of an insurable interest in a sum insured by a Provident Society are defined in that part of the Act which deals with insurers of that kind.<sup>1</sup>

**Insurable interest a species of property.**—In the law of India, all property is broadly classified under two categories, “moveable” and “immoveable”. As every Indian law student knows there is included in

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<sup>1</sup> Part III of the Act, sec. 68.

the category of immoveable property everything which under the law of England would be styled "real property". In *Maharana Futehsangji v. Desai Kallianraji*, [1874] 1 I.A. 34, 50-51, it was said by the Privy Council that the words "immoveable property" counted something less technical than "the reality" in the law of England, and included all that would be real property under English law and possibly more; and that if the nature and quality of a property could only be determined by Hindu Law and usage, then such law might properly be invoked for the purpose. The layman will readily see that what commercial men call "goods" must fall within the category of moveable property. He will, however, be less prepared for the information that an insurable interest is "property" which has to be classified as "moveable". The reason is that an insurable interest is something which in the law of India is included in the notion of an "actionable claim". It must not, however, be supposed that to have a mere right to sue is *per se* to enjoy an actionable claim. The distinction is an important one because of the respective limitations imposed by law in the matter of the transferability of rights. A mere right to sue may, to that extent, pass from him who originally had the right to some other who had acquired it. But in contemplation of law, an actionable claim is a species of property to which the right to sue is merely incidental. Because an insurable interest is included in that form of property which is designated an actionable claim, the rights under policies of insurance are, generally speaking, transferable to the same extent and within the same limitations as are other actionable claims made transferable by the law of India. But the reader is warned that the rights under several kinds of insurance policies in the matter of transferability form exceptions to some of the more general rules governing the transferability of actionable claims. These exceptions will be discussed later in their appropriate places.

**Subject and enjoyment of insurable interest.**—It is not the aim of the present chapter to anticipate that more detailed discussion of this topic which appropriately belongs to individual types or classes of insurance business falling to be dealt with in later chapters of this treatise: our present purpose being rather to indicate the extent of the ground which is covered by the doctrine.

At the outset, however, it must be observed that no part of the law applicable to this topic in British India, with one small exception,<sup>1</sup> is in any sense the creature of statute. It is otherwise in England. It is manifest, however, that the Indian courts, in construing contracts of insurance, will continue to adopt the doctrine of insurable interest as the same has been expounded by the English courts; and that the tests applied in individual controversies will be those which have commended themselves to English judges called upon to deal with similar controversies arising out of modern insurance dealings.

It is to be collected from the case-law that the following persons are recognised as having an insurable interest in the subject-matter shown:—

Owners of property, in that property whether moveable or immoveable; vendors and purchasers, mortgagors and mortgagees of all such

<sup>1</sup> The (Indian) Insurance Act, 1938, Part III, sec. 68 reads as follows:—

"No provident society shall receive any premium or contribution for insuring money to be paid to any person other than the person paying such premium or contribution or the wife, husband, child, grandchild, parent, brother or sister, nephew or niece of such a person."

property; landlord and tenant in the land or premises demised; bailees, gratuitous or for reward, pledgor and pledgee, consignor and consignee, common and all other carriers, and lien-holders, in the property respectively entrusted to them or in their possession; a shareholder in his share; an agent in his commission; a man engaged in trade or commerce in his stock-in-trade as well as in his profits; an hirer in that which he hires; and an insurer in his risk.

Every adult person has an insurable interest in his or her life and health. The law recognises insurable interests mutually arising out of the relation of husband and wife, of parent and child, master and servant, trustee and *cestui que trust* and also recognises the interest of a creditor in the life of his debtor.

Every person, too, is recognised as having an insurable interest in a real or supposed liability to some one else, and may thus provide against the risk of any such liability being brought home to him. Hence arises the right enjoyed by insurers to reinsure. Hence, too, has originated that large class of modern insurance business designed to cover what, in the commercial world, is known as "third-party risks". In brief, he may now be said to have an insurable interest where not to insure would expose him to uncompensated injury or loss.

The above list is by no means exhaustive of those persons and things whose relationship may create an insurable interest. And the student is warned that many of the interests thus broadly stated as "recognised", are not so recognised without qualification, thus often giving rise to questions of some nicety.

"Honour" policies, so-called.—Before leaving this brief introduction to the theory of "insurable interest", mention—for purposes of illustration—may be made of a form of policy which gave some trouble to lawyers of an earlier generation, and which cannot yet be described as obsolete. Reference is here made to what in the insurance world has long been known as "p.p.i." policies. The name derives from an originally innocent attempt to overcome the frequent difficulty which beset the parties to an insurance policy in proving the assured's interest and its extent. For that purpose, by the ingenuity of commercial lawyers had been devised a special clause in the policy including some such words as "this policy to be deemed sufficient proof of interest"—whence the abbreviated phrase "policy proof of interest", for which the letters "p.p.i." eventually came to stand. Variants appearing on slips or cover notes took such forms as "without further proof of interest than the policy" and even the less judicious phrase "interest or no interest".

In marine policies so characterised, since what was supposed to be covered was not actually "at risk", underwriters not infrequently inserted a clause reading "free of all average and without benefit of salvage".<sup>1</sup>

The effect of any such terms in a contract of insurance is, by disclaiming an insurable interest, to make the contract one of wager; and not the less so that by the custom of merchants has been exhibited an intention to be bound by them, an indication of which attitude is to be found in the constant reference to "p.p.i." policies as "honour policies".

Attention has already been drawn in the previous chapter of this treatise to the fact that wagering contracts were in England not void

<sup>1</sup> The student as yet unacquainted with the meanings of these expressions will find them in that portion of this treatise which deals with Marine Insurance. See, respectively, pp. 103, 112, *post*.

at common law. Thus, for a considerable period the common law and the custom of merchants were, in the foregoing respect, not at variance. It was the notable abuse of contracts styled "honour policies" which proved such a danger to genuine commercial enterprise, and which led Parliament to intervene by the Act 19 Geo. II, c. 37. That statute put the making of such insurances on British ships or cargo under express interdict. The relative provisions are short and to the point: "Be it enacted that no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to His Majesty or any of His subjects, or on any goods, merchandises or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes."

How acute had been the controversy as to the true legal position at common law in respect of an assured's interest in the risk purported to be covered by such a policy, may be seen from the fact that, in 1798, it had been categorically stated by Lord Kenyon that "a person at common law might have insured without interest". See *Craufurd v. Hunter*, [1798] 8 T.R. 23. This dictum was accepted in 1802 in *Nantes v. Thompson*, [1802] 3 B. & P. 101, wherein,—though at a later date—([1806] 2 B. & P. N.R. 321) Lord Eldon dissented from Lord Kenyon's views. Finally, in 1811, by the decision of the Exchequer Chamber in *Cousins v. Nantes* (3 Taunt. 513) the views expressed in *Nantes v. Thompson* together with Lord Kenyon's opinion were overruled.

The position in England today is that all such policies are void under section 4 of the Marine Insurance Act, 1906. But inasmuch as holders of marine policies of insurance issued by an insurer in respect of insurance business transacted in British India may, in certain events, choose not to avail themselves of the provisions of section 46 of the (Indian) Insurance Act, 1938, it may be useful to remind the general reader of the relative provisions of the English Statute<sup>1</sup> in respect of this topic.

"(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

- (a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or
- (b) Where the policy is made "interest or no interest", or "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer", or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer."

As pointed out by the editors of the 11th edition of *Arnould's Marine Insurance*<sup>2</sup> the statute of George II, to which reference has been made above, in terms only affected wagering policies on British ships and their cargo, and had been held not to extend to foreign vessels; while under

<sup>1</sup> Sec. 4, Marine Insurance Act, 1906 (6 Edw. VII, c. 41).

<sup>2</sup> Vol. I, p. 434.

the recent Marine Insurance Act, there is no such limitation. The last-named Act moreover has been made applicable to Ireland, to which territory the statute of George II did not extend.

In the second edition of Halsbury's *Laws of England*, Vol. XVIII, Art. 314, the opinion has been expressed that a p.p.i. policy is not necessarily inconsistent with the assured having an insurable interest; that indeed, it often happened that such a policy was effected by persons who had an insurable interest, but wished to avoid the difficulty of proving it. "In such a case" the learned author of the article continues "the policy would not be a wagering contract within this provision"—i.e., within section 4 (2). It is to be noted that such an opinion is not reconcilable with the decision of the Court of Appeal in *Cheshire & Co. v. Vaughan Bros. & Co.*, [1920] 3 K.B. 240 of which mention is made below.

**"Honour" contracts in India.**—It is submitted that a p.p.i. or any other form of so-called "honour" policy in India is void under section 30 of the Indian Contract Act, as being an agreement by way of wager. And it is conceived that the reasoning adopted by McCardie, J., in *Cheshire Co. v. Vaughan Bros. & Co.*, [1919] 25 Com. Cas. 51, approved as it was when that case went to the Court of Appeal [1920] 3 K.B. 240, would be followed by the Courts in India if called upon to construe such a contract, or to deal with any clause, or with any form of words on a slip or cover-note designed to avoid the doctrine of insurable interest. The opinion of McCardie, J., in the original Court was in these words: "The sub-section ((1) of section 4 of the Marine Insurance Act, 1906) constitutes an emphatic condemnation by the legislature of any gaming contract in respect of marine insurance. It must be remembered that this sub-clause rests upon no mere technicality. It is based upon public policy and it was passed in order to prevent, if possible, what was deemed to be a grave public mischief." The same learned Judge, in *John Edwards & Co. v. Motor Union Insurance Co.*, [1922] 2 K.B. 249 at 255, expressed himself as follows: "I think that Parliament has placed a p.p.i. policy on much the same footing as a wager on a horse race. In substance, it is a mere bet. The insurer agrees to pay on the occurrence of a given event irrespective of the actual interest or loss of the assured. It is nonetheless a bet in substance, because the wagering parties may have clothed the wager with certain conditions. Section 4 of the Act of 1906 cannot be defeated by a mere device of phrases." The learned Judge goes on to point out that where a policy when properly construed turns out to be a mere wager and not a contract of indemnity "there is no juristic scope for the operation of the principle of subrogation. The essential basis of subrogation is wholly absent". It is submitted that the foregoing considerations as expressed in the *dicta* cited are apposite as indicating the matter of public concern which is to be regarded as informing section 30 of the Indian Contract Act; but, as in England at the particular date, so here in India, the relative statutory provisions concerning wagering contracts render such contracts void but not illegal. The commercial community in England, however, and its legal advisers were not slow to perceive the effect of this state of things; and in consequence many and persistent have been the methods of evasion resorted to. For instance, a detachable slip is often provided containing a p.p.i. clause which can be removed on the threat of litigation. Again, stipulations have been found inserted in policies providing that the p.p.i. clause is to be deemed no part of the policy, but is yet to be binding in

honour upon the underwriters. An example of an attempt of this character fell to be considered in *London County Commercial Reinsurance Office, Ltd.*, [1922] 2 Ch. 67, 82, where it was held that the test of validity is the condition of the instrument at the time of issue, and that the parties cannot by agreement or by subsequent conduct make valid a policy which was void when issued. There is also the broader ground that parties cannot waive an illegality or a nullity (*Royal Exchange Assurance v. Sjöforsakrings*, [1902] 2 K.B. 384); and the judicial opinion which takes its origin from the same juristic idea, namely, that a bargain not to dispute a void contract is itself void. (*London County Commercial Reinsurance Office Ltd.*, [1922] *supra*.)

In England the legislature, three years later, by the Marine Insurance (Gambling Policies) Act, 1909,<sup>1</sup> made it a criminal offence to effect a contract of marine insurance without having any *bona fide* interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a *bona fide* expectation of acquiring such an interest. Any broker or other person through whom, and any insurer with whom, such an insurance is effected is also guilty of an offence if he acts with knowledge that the insurance was one prohibited by the statute.

The position is otherwise in India, where the penal sanctions to be found in the relative Acts have reference only to such matters as the maintenance of gaming houses and the running of lotteries.<sup>2</sup>

In one circumstance, however, the position in India with regard to the validity of p.p.i. contracts is healthier than is the case in England. For, in England, where the subject-matter of insurance is a chattel, it seems that the whole transaction is outside the Act, and in *Williams v. Baltic*, [1924] 2 K.B. 282, it was held that the Act had no application even to insurance against a third-party risk incidental to the insurance of a car. In India any contract of insurance, to be valid, must not offend against public policy or be, in essentials, an agreement by way of wager; and consequently, it is submitted that every such stipulation as has in England been introduced with the idea of evading the law will be void under section 30 of the Indian Contract Act, no matter what be the type of insurance or what the nature of the thing insured or the risk purported to be covered.

**Ostensible interest in illegal insurances.**—It is the policy of the law to recognise no insurable interest in the subject-matter of an illegal contract or in the doing of anything which assists or encourages either the insurer or the assured in the commission of unlawful acts. It is said that "if the interest of the assured is tainted with illegality, he cannot recover on his policy".<sup>3</sup>

## 5. Subrogation.

**Origin of the notion.**—The topic of subrogation has already been briefly introduced.<sup>4</sup> What is sought to be expressed by the word is a doctrine which has been only gradually evolved. It is thought by some

<sup>1</sup> 9 Edw. VII, c. 12.

<sup>2</sup> See Public Gambling Act (III of 1867), sec. 3; and Indian Penal Code (Act XLV of 1860), secs. 268 (nuisance) and 294A (lottery).

<sup>3</sup> Macgillivray, *op. cit.*, 2nd Ed., p. 256.

<sup>4</sup> See pp. 53, 63 and 66, *ante*.

that our present doctrine of subrogation marks but one stage of a juristic idea not even yet fully developed. French and English jurists are not yet agreed as to its origin; though the derivation of the word itself is obvious.<sup>1</sup> So, too, is the nearness of its meaning as used in the middle ages to that of "substitution". That nearness of relationship is well illustrated when a judge, a text-book writer or a practising lawyer to-day refers to a creditor, seeking to avail himself of the principle of subrogation, as to one who is "standing in the shoes" of another. Pothier<sup>2</sup> and Flach<sup>3</sup> assume, rather than establish, the origin of the doctrine as discernable in the Roman Law. But certain it is that the Latin word "*subrogatus*" is not to be found in the texts as indicating a "substitute" with such rights as those with which Equity to-day invests him who claims to "stand in the shoes" of another by virtue of the modern doctrine. It seems true, however, that the notion which has reached us represents a fusion of the Roman notions of *beneficium cedendarum actionum*, and *successio in locum creditoris*. A citizen in the Roman Law who made use of the right to pay off a prior creditor (under the *jus offerendae pecuniae*) could in that manner succeed to his place in the chain of priorities. But this did not place him precisely where those to-day are positioned who can avail themselves to the full extent of this equitable doctrine as at present developed in the Law of England. It is thus not surprising if the balance of English learning to-day is in favour of the view that what passes as the benefit under our modern doctrine of subrogation, as also whatever disability may accompany a claim to such benefit, has less to do with the Roman Law than with that idea of "good conscience" which the common law courts so far back as the 13th and 14th centuries boldly invoked when the plain justice of the case demanded it.

For the Indian student it may seem matter of interest to realise that, great as is the claim of the Court of Chancery to have developed Equity as we now know it, it is to the old common law judges of the 13th and 14th centuries that English jurisprudence owes much of its own claim to have evolved a system of justice worthy the approbation of right thinking people the world over. But the conflict of rule with reason is never ending. Nor was there a time—at any rate since King Henry II sat on the Throne of England—when that conflict was not discernable in some form or another: and certain it is that each side had its adherents in the English Courts of Common Law well before the members of the Court of Chancery became protagonists in the fray.<sup>4</sup> It must be remembered moreover, that the administration of justice was wholly in the hands of the priestly caste, not only in England but throughout

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<sup>1</sup> The word "subrogation", which is the same both in French and in English, derives from the past participle of the Latin word "*rogare*"—"to ask" coupled to the preposition "*sub*", conveying here the notion of asking or claiming "under". In the Latin of the middle ages a person was regarded as having been "subrogated", or "surrogated", when he had become "substituted" for another. Thus, in ecclesiastical law, he who is the deputy of a Bishop for some particular purpose is often styled the "Surrogate".

<sup>2</sup> *Coutume d'Orléans*, 20, 5.

<sup>3</sup> *De la Subrogation Réelle*, 4.

<sup>4</sup> The Indian student curious to trace for himself the original springs of that notion of "justice, equity and good conscience", which he is taught may be relied upon as informing the decisions of the judiciary in his country, may be referred to S. G. Fisher's article "*Equity through Common Law forms*", *Law Quarterly Review*, I, 482 and Vinogradoff's "*Reason and Conscience in 16th Century Jurisprudence*", *Law Quarterly Review*, XXIV, 374.

Europe. The Canon Law, being the law of the Church, was considered pre-eminently to derive from moral principles. Thus is the effect of this condition of things upon the history of English Law summed up by a distinguished modern student.<sup>1</sup> "The common lawyers of the 15th century joined the ecclesiastics seated in the Chancery in framing views about the administration of equity, which, though 'Decretals' and '*Summae Confessorum*' were not quoted, strongly savoured of the principles and distinctions of the Canon Law. The marked differences on particular points are hardly sufficient to obliterate the impression that we have to reckon not only with the stress of business requirements and with a spontaneous growth of English doctrines, but also with a process of indirect reception of Canon Law."

Naturally the student of our law as it is found in working order to-day, is less interested in the original spring than in the main channel of the river as he finds it. But, it may remain perhaps of some interest for him to realise how very recently we find English common law judges still conscious of their own contributions to "justice, equity and good conscience". We are so accustomed to regard the Court of Chancery in the 18th century as the professed exponent of every equitable doctrine, that it may be useful to remind the student-reader that so late as 1769 a common law judge was delivering himself of the following opinion "Principles of private justice, moral fitness, and public convenience . . . when applied to a new subject, make common law without a precedent": *per* Willes, J., in *Millar v. Taylor* (1769), 4 Burr. 2303, 2312; while it is but the other day that Lord Dunedin described the Common Law Action for "money had and received to the use of the plaintiff" as "the putting of an equitable doctrine under a legal form". In so saying Lord Dunedin was at pains to make clear that he was using the word "equitable" in the non-technical sense. "for" said he "I am not suggesting for a moment that the action was borrowed from technical equity. My noble and learned friend Lord Sumner, . . . has conclusively shown that it was not". (*Sinclair v. Brougham*, [1914] A.C. 398, 431).

**Modern usage.**—The use which is made of the doctrine of subrogation to-day, especially in regard to contractual relations, in which a third party is recognised as having an interest, indicates a steady development of the original theory.

A trustee who himself spends money of his own in furtherance of the object of the trust, and as implementing his duty thereunder, *e.g.*, the protection of the trust property, may reimburse himself out of the trust fund to the extent of the advances he has made. Suppose in so spending the moneys for the above purposes he has placed an order with a tradesman which the funds then at his disposal do not completely cover. The tradesman naturally has recourse to the trustee, and in his turn the trustee may reimburse himself from the trust estate when he can. But suppose the trustee places the order, takes delivery of the goods and does nothing to meet the bill. Then the creditor may claim against the estate by virtue of the doctrine of subrogation. He may claim to stand where the trustee could have stood, and may make upon the estate just such a demand as the trustee might have made, *namely*, to be reimbursed for what he has done towards the preservation of the trust property.

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<sup>1</sup> The reference is to Vinogradoff, *op. cit.*

On the other hand, one who claims to stand in the shoes of another person supposed to be a creditor, can only succeed against the third party if he through whom the creditor thus claims occupies in fact the position predicated. So, if it should turn out that the person through whom the tradesman thus claims is not a creditor, but rather a debtor to (say) the estate of which he is trustee, the doctrine of subrogation will avail him nothing; since because of the debt there can be no credit balance for anyone else to enjoy. These doctrines, both as conferring a right and as attended with a possible disability, have long been settled law in England. "Where a trader has, by his will, directed his executor or trustee to carry on his trade, and to employ a specific portion of the trust estate for the purpose, the rule is that, though the executor or the trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; and, consequently, the creditors of the trader are entitled to stand in the place of the executor and trustee, and to claim the benefit of that right, so as to obtain payment of their debts: but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade: in such a case, the defaulting executor or trustee not being himself entitled to an indemnity, except upon terms of making good his default, the creditors are in no better position, and are, therefore, not entitled to have their debts paid out of the specific assets, unless the default is made good": *per* Jessel. M.R., in *In re Johnson*: *Shearman v. Robinson*, [1880] 15 Ch.D. 548.

**Doctrine applied in India.**—The doctrine as so expressed by Sir George Jessel has been frequently applied in India, and may be regarded now as part of the settled law of the land. It was expressly applied by Sale, J., in a Calcutta case early in the present century, *In re Shard*, [1901] 28 Cal. 754; and by a bench of the High Court of Madras some years later, *Suaminatha Aiyar v. Srinivasa Aiyar & Ors.*, [1909] 32 Mad. 259. The student will find a full discussion of the English and Indian cases in *Sailendra Nath Palit v. Syed Hade Kaza Mane*, [1931-32] 36 C.W.N. 193 decided in 1931 by a bench of the Calcutta High Court consisting of Mukherjee and Guha, JJ. In that case money having been lent to a *mutuali*, and purported to be secured partly by a hand-note executed by him, and partly by a deposit of Title Deeds and the assignment of some rents. The Court, in a considered judgment, reasserted the doctrine that so far as the personal security was concerned, the creditor must look to the maker of the instrument: and that, in order to have recourse to the estate, the creditor might avail himself of the principle of subrogation: that is to say, to the principle that he would be entitled to the right, if any, of the *mutuali* to be indemnified out of the *Wakf* property. This decision has been followed consistently in the latest cases and the principle applied to *shebaitis* under the Hindu Law.<sup>1</sup>

**Subrogation in the law of insurance.**—In no branch of the law has the principle of subrogation been so consistently developed and applied as in the law relating to insurance. As it depends for its application in that field entirely upon the assured's right to receive indemnification under the contract or to be recompensed under the

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<sup>1</sup> See *Mackintosh Burn v. Shivakali Kumar*, [1933] 60 Cal. 801; *Zubaida Sultan Begum v. Dawood Imaail Makra*, [1937] Cal. 99.

terms of a guarantee for a loss actually sustained, it follows that the doctrine has no applicability to insurance contracts which have no such object.<sup>1</sup> Thus, wherever what the parties have agreed upon is the ultimate payment of a fixed sum, the obligation upon the insurer is to pay that sum without reduction.<sup>2</sup> It is obvious, therefore, that where the benefit for which the assured pays his premium is the securing of a definite sum, with or without accretions thereto, the purpose (in the sense of motive) which led the assured to enter into the contract is irrelevant. Accordingly (save as an aid to determining the good faith of an applicant for insurance) it is no direct concern of the insurer whether the latter has entered, or proposes to enter, into similar contracts with other insurers. True, an insurer may be disinclined to insure a man's life where the candidate is known to have obtained policies from other insurers upon terms incommensurate with his apparent power to keep up the premiums. And true it is that any question put to the candidate upon such a matter must be truthfully answered upon the principle of *uberrima fides*: the reason being the necessity for arriving at some conception of the candidate's financial standing, and for estimating the danger of having to meet a fraudulent claim. The law, it must not be forgotten, permits any man to insure with as many insurers as he can find willing to contract with him. But where the contract is one of indemnity, the law does not permit an assured, whether under one of several contracts or under the aggregate of them, to recover more than the loss he actually suffers by the peril against which he seeks to guard. It will readily be appreciated, then, that the knowledge of the existence of every other contract of indemnity or guarantee becomes of the greatest moment to every insurer who has entered into such a contract with one and the same assured in respect of one and the same peril. So it is here that equity comes to the aid of the insurer by the application of the doctrines of subrogation and contribution.

**Practical application of the doctrine.**—The oft-quoted classical passage from the judgment of Lord Blackburn in *Burnand v. Rodocanachi*, [1882] 7 A.C. 333, 339 is worth recalling: "The general rule of law (and it is obvious justice) is that when there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay, and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

Just as the assured's right to receive indemnification under the policy does not attach till the event relied upon as occasioning the loss shall have occurred, so the right to subrogate cannot be enjoyed till the insurer shall have met his own obligation in full; nor can the insurer recover under the doctrine until the assured shall have received the full indemnity from whatever resources he may have drawn upon for that

<sup>1</sup> Nor where the contract is void, e.g., a so-called "honour policy". See pp. 69-72, *ante*.

<sup>2</sup> Where the assured may have borrowed upon the policy from the insurer there will naturally arise a right to set off any portion of the outstanding debt against what is ultimately due to the assured upon his policy. But that is more matter of accounting, the insurer's liability to pay the sum assured remaining unaffected.

purpose. This is to summarise the effect of a chain of cases which, metaphorically speaking, has stretched across the Atlantic and back again. Insurance law has, in fact, developed upon similar lines in Great Britain and her dependencies, as also in the United States of America; and the respective decisions of British and American Courts as expressing the law relating to modern insurance transactions are mutually regarded as authoritative (*King v. State Mutual*, [1851] 6 Mass 1; *Liverpool Steam Co. v. Phoenix etc.*, [1888] 129 U.S. 397, 462; *Niagara Fire v. Fidelity Co.*, [1888] 123 Pa. 516; *Fidelity Co. v. Gas Co.*, [1892] 150 Pa. 8; *Page v. Scottish Insurance Corpn.*, [1929] 98 L.J. K.B. 308; *London Guarantee & Accident v. North Western Utilities*, [1932] 2 W.W.R. 430 (Canada)). From *Page v. Scottish Insurance etc.*, may be quoted a passage in the judgment of Scrutton, L.J., as illustrating one of the propositions enunciated above: "If you get one car, one accident, one policy, one premium, I do not think the underwriter can claim to be subrogated until he has satisfied all the claims arising under that policy and paid for by that one premium in respect of that one accident and that one car."

✓ Since, at any rate, *Castellain v. Preston*, [1883] 11 Q.B.D. 380, any claims of the assured, whether arising out of tort or contract or upon any other ground of legal responsibility, vest in the insurer by subrogation where the contract between the insurer and the assured is one of indemnity. The same case is an authority for the proposition that ignorance on the part of an insurer of some benefit to which he would be entitled under subrogation will not defeat him if he afterwards come to learn of it.

It is thought proper to relegate to a later chapter of this treatise, wherein the reader will find some detailed discussion of the enforcing of contracts of insurance in British India, those methods by which in actions at law the rights arising out of the doctrine of subrogation may be established.

The equitable principles which have been discussed in this section of the present chapter have found expression in the Indian Contract Act in several places, e.g., sections 69, 140, 141 and 145, to which attention has already been drawn in outlining the concept of guarantee as the same is understood in the law of India.<sup>1</sup>

## 6. Contribution.

The doctrine of contribution, so far as it concerns a contract of insurance, is an equitable doctrine entirely arising out of the relationship of creditor and surety, or that of indemnifier and the person indemnified. The sections of the Indian Contract Act dealing with this principle have already been set out and discussed in an earlier part of this chapter.<sup>2</sup>

Apart from the terms of any special contract, the rights of any party to contribution, under a contract of insurance, if the same be litigated in British India, must, notwithstanding any English authorities on the point, be determined in accordance with the law as laid down in those sections. How contribution so determined may work out in individual cases, and under particular types of policies, notably policies of marine insurance, will be dealt with in later chapters of this treatise.

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<sup>1</sup> See pp. 58 and 66, ante.

<sup>2</sup> See pp. 65 and 66, ante.

### 7. The Policy.

The modern policy of insurance takes many forms. As already observed in the first chapter of this treatise, the form of a marine policy has been settled by custom; and in spite of adverse criticism from many quarters, it continues to retain most of its age-long characteristics in point of style. The Insurance Act of 1938 does not anywhere define the nature of a policy. The Indian Stamp Act comprises two definitions.<sup>1</sup> In strictness, a policy of insurance is no more than a document evidencing the terms under which the parties to a contract of insurance agree to be bound. As, under the law of India, a contract may be made as well orally as in writing, it is conceived as not being impossible that the relationship of an insurer and an assured might be created without a written instrument. But in that case there would be no "policy", as the word is understood by commercial usage, on which to sue. By the law of India<sup>2</sup> no contract for sea-insurance (other than such insurance as is referred to in section 506 of the Merchant Shipping Act, 1894), is valid unless the same is expressed in a sea-policy. The effect of this provision is discussed in a later chapter of this treatise.

The effect of section 7 of the Indian Stamp Act was considered by the Privy Council in *Surajmull Nagoremul v. Triton Insurance Company, Ltd.*, [1924-25] 52 I.A. 126. In that case their Lordships disposed of the contention that the quotation of a premium for a marine insurance, verbally accepted, constituted a contract of marine insurance capable of being sued upon in the law of India. The point that the provisions of section 7 of the Stamp Act was conclusive of the matter in controversy had neither been pleaded, nor raised in either of the Courts below. The Board permitted the point to be taken. Referring to the section itself the judgment, which was pronounced by Lord Sumner, proceeded: "it is not confined to affording a party a protection of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea-insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of section 7 would defeat the provisions of the law laid down therein. In England this is well-settled law: see—*Fisher v. Liverpool Marine Insurance Co.*, [1873] L.R. 8 Q.B. 469; *Ionides v. Pacific Insurance Co.*, [1871] L.R. 6 Q.B. 674, 685 (Blackburn, J.) *Xenos v. Wickham*, [1867] L.R. 2 H.L. 314 (Willes, J.); and there is no ground for construing the Indian Act, expressed in almost identical terms, in any different way. The observations of the High Court in *The Reference under the Stamp Act*, [1903] I.L.R. 30 Cal. 565, distinguishing a contract for sea-insurance and a policy of sea-insurance seem to have been directed to another point, and *Bhagwandas v. Netherlands, etc. Insurance Company*, [1883] 14 App. Cases 83 was before the Stamp Act. In their Lordships' view the contract alleged by the plaintiff was a contract for sea-insurance and nothing else, and, not being expressed in a policy, was unenforceable".

<sup>1</sup> Act II of 1899, sec. 2 (19) and (20). The first offers a general definition, and the next defines a "sea-policy".

<sup>2</sup> *Ibid.*, sec. 7, read with sec. 2 (20).

In England, the custom of merchants, whereby some slip, note or other document must be brought into existence before the assured shall have acquired protection, and the case-law, whereby a written instrument has, in some form or other, to be executed, now forms part of the statute law of the land. By section 30 (a) of the Assurance Companies Act, 1909,<sup>1</sup> a policy on human life is defined as meaning "any instrument by which the payment of money is assured on death (except death by accident only), or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life".<sup>2</sup>

It is not uninteresting to observe that, except in marine insurance, informal oral agreements in England had never been expressly held *not* to be binding, if it could be gathered from their terms as proved that they were intended to be contracts of insurance. But the practice, all over the world, is for contracts of insurance to be in some way or other reduced to writing. In the United States of America an attempt was made to induce the Courts to hold that the custom amongst businessmen was such that the reduction of a contract of insurance to writing as a pre-requisite to validity should now be regarded as having been incorporated into the law merchant, and ought to be recognised also as part of the common law of England. The contention failed before the Supreme Court. The decision dates from 1856.

Every policy is to be construed with reference to what is styled the Proposal. In case of any disconformity between the terms of the contract as expressed in an instrument construed as a policy, and any other document, the terms in the policy prevail.

In general the assured has the right to the possession of the policy. But an assignment of a policy has the effect of creating a *prima facie* right in the assignee to possession of the document.

**Interim protection.**—It commonly happens, from the scale on which modern insurance is transacted, that some time elapses between the date on which the applicant's proposal is accepted and the date on which a policy in due form is issued to him. By customary usage some form of interim protection is afforded him upon payment of the requisite premium. Such interim protection, or "cover" as it is called, takes various forms. In fire, burglary, accident and motor car insurance, such cover is given upon application and payment either of the whole, or some agreed portion, of the first year's premium. It has been justly said that the principal object of the ordinary interim receipt is to give immediate protection pending the decision of the directors and the issuing of a policy; and that the receipt will not readily be construed as affording merely conditional protection subject to the approval of the directors, for such a construction would make the receipt practically useless.<sup>3</sup> Except in the case of applicants from distant countries, interim protection is rare in life insurance business. India presents an example where at any rate a number of foreign concerns offer interim protection on lives reported "good", whether in respect of life policies or of life policies

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<sup>1</sup> 9 Edw. VII, c. 49.

<sup>2</sup> The definition of a "sea-policy" (alluded to above) which is found in the Indian Stamp Act does not in terms refer to any "instrument" or to any "document".

<sup>3</sup> See Macgillivray, *op. cit.*, 2nd Ed., p. 315, citing *Wylie v. Times Fire*, [1860] 22 D. 1498.

combined with an endowment scheme. The debatable question how far a "slip" or "cover-note" may be so phrased in regard to a maritime risk as to amount to a "sea-policy" is left for discussion in a later chapter.

The principal characteristics of modern policies will be dealt with in more detail in those later chapters of this treatise which are devoted to particular classes of insurance business. The student should remember that it is a question of construction, in each case, whether the document relied upon as founding the relationship of insurer and insured is, or is not, to be held a policy.

The topic of forfeiture, though perhaps properly belonging to a discussion of the policy, is, for the purpose of this brief preliminary study, more conveniently dealt with in the section devoted to the topic of premium.

### 8. The Premium.

This word (from the Latin *praemium* meaning a "reward") denotes the sum of money paid under a contract of insurance by the assured to the insurer, and which represents the consideration for the policy. It is usually payable annually, but may be payable at shorter intervals; and in certain classes of insurance business consists of one lump-sum payment. Apart from any conditions in the contract to the contrary, the insurer's liability does not attach till the first premium shall have been paid. In case of payments after the first payment, it has been recognised by the commercial world to be expedient to allow the assured a certain number of days after the date when, in strictness, the premium falls due, within which to make payment so as to keep the policy alive. Such days are known as "days of grace". Certain classes of insurers are prepared by agreement to leave the rate of premium open for future settlement. Such an arrangement is a common practice with Lloyd's underwriters. There is nothing to prevent insurers waiving pre-payment as a condition of liability, and in such circumstances, though they may not be prepared to admit such a waiver, they may find themselves estopped by their conduct from setting up the condition. There is a settled principle in marine insurance that the acknowledgment of the receipt of premium cannot be disputed by the underwriter, who must look to the broker for payment, so that as between underwriter and assured the premium is deemed to be paid by the issue of the broker's receipt.

**Mode of payment.**—Unless an insurer has expressly authorised payment by cheque, payment will only become effective from the date of the receipt of its proceeds, the insurer being entitled *prima facie* to receive payment in cash at his principal place of business. The assured, it has been held, is not entitled, when meeting with the insurer's refusal to receive the premium as tendered, to a declaration by the Court that his policy is valid (*Honour v. Equitable Life, etc.*, [1900] 1 Ch. 852). It seems that if what the insurers do in this or any other like manner amounts to repudiation of the contract on their part, the assured need make no more formal tender of further premium (*McKenna v. City Life Assurance*, [1919] 2 K.B. 491, 495). The insurers may, at any time, and notwithstanding any particular terms in that behalf contained in the policy, extend the time for payment of the premium; and, even after the policy has lapsed, may be held to have revived the insurance upon the same terms if by their conduct they have done anything to lead the assured

to suppose that they have resumed the risk. (*Kirkpatrick v. South Australian, etc.*, [1886] 11 A.C. 177.)

**Forfeiture.**—In strictness, and unless there be any provision to the contrary, the policy lapses by failure to pay the premium within the due time. The reported cases in America contain many instances of the Court drawing an inference from unpunctual payments being received without protest by insurers that the insurers intend a waiver of their right to strict punctuality. Forfeiture of a policy may be waived not only by acceptance of an overdue premium, but by the making of a subsequent demand for payment.

**Powers of Agents in the matter of waiver.**—The American Courts in a long chain of cases have treated an agent of an insurance company as not a general agent with full contractual powers, and therefore as having no authority to waive any condition appearing in the policy. It is submitted that it must be a question of fact in each case whether an agent has or has not such authority.<sup>1</sup>

**Return of premium.**—It is as old as *Stevenson v. Snow*, decided by Lord Mansfield in 1761, that equity implies a condition that the insurer shall not receive the price of running a risk if he runs none. In *Tanjore Life Assurance Co. v. Kuppanna Rao*, [1920] 43 Mad. 333 it was said that, roughly speaking, in three classes of cases the assured can claim refund: where there has been fraud on the part of the company, or where the policy was void *ab initio*, or where no risk has been occasioned the insurer. The sections of the Contract Act dealing with refund or compensation of which the assured may take advantage are sections 64 and 65 which are in these terms:—

"64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding<sup>2</sup> a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

If during the currency of a policy insurers wrongfully repudiate the validity of the contract, there are two remedies open to the assured, and he must elect which he will pursue. He may either bide his time, and sue for specific performance when the occasion for enforcing the contract arises, or he may treat the repudiation as a final breach, and sue for a return of premiums as damages (*Brewster v. National Life*, [1892] 8 T.L.R. 648).

**Recovery of premium disallowed.**—Where parties are each aware of something vitiating a contract of insurance, equity does not

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<sup>1</sup> See *Universal Fire and General Insurance, etc. v. Shup Sin Atai*, [1934] 4 Comp. Cas. 428 (Rangoon).

<sup>2</sup> The word "rescind" sometimes gives trouble to students. Literally it means "to cut back", in the sense of cutting oneself away from the contract at the root. It may be taken to be the equivalent of "repudiate". A contract may be rescinded by agreement, or unilaterally.

intervene to assist the assured, on the principle that should he make a claim to refund of premium the maxim *in pari delicto potior est conditio defendentis* applies<sup>1</sup> (*Harse v. Pearl Life Assurance Co.*, [1904] 2 K.B. 558).

### 9. Assignment and Nomination.

The topic of the transferability of property—using the word property in its widest sense—is in India the subject of special enactment. There is, firstly, the Indian Succession Act (XXXIX of 1925), which to a large extent, but unhappily not entirely, codifies the rules affecting the devolution of property on the death of those who have such an interest in property as can be transmitted by operation of law, or by the law's recognition of a testator's wishes as expressed in what, all over the English speaking world, is known as his "Will". In 1882 was passed the Transfer of Property Act (IV of that year). It has been no fewer than sixteen times amended. As a well-known commentator on the Indian Codes says, its chief objects were first to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution on death, and thus to furnish the complement of the work commenced in framing the law of testamentary and intestate succession; and, secondly, to complete the code of contract law so far as it relates to immoveable property.<sup>2</sup> It thus makes no pretence to complete the code of contract law so far as the same refers to "moveable" property, though, in fact, it goes some way towards it. It is consequently not exhaustive, and is not to be regarded as a complete code. Before its enactment there was very little statute law touching rights in relation to what in England is known as "real property"; while rights to things less tangible than land, buildings, goods and chattels, the Courts could only determine in accordance with justice, equity and good conscience, professing to find those principles in the law of England as it then stood. It is thus of interest to see the Transfer of Property Act spoken of as not intending to introduce any new principle (*Tajjo Bibi v. Bhagwanprasad*, [1894] 16 All. 295). What the Act does then, as its preamble states, is "to define and amend certain parts of the law relating to the transfer of property by act of parties". A study of it will reveal to the student that, in a major degree, it gives statutory force to the rules which had been already applied by the Courts in cases now sought to be covered by the Act. In cases not so covered, the Courts of India continue to apply the familiar rules of English law so far as the same are not found inconsistent with the Act itself (*Maya Shankar v. Burjoji*, [1925] 27 Bom. L.R. 1449). In an appendix to this present treatise will be found reprinted all those sections of the Transfer of Property Act which affect the law relating to insurance in British India.<sup>3</sup>

The student and the lay reader will bear in mind that not only the subject-matter of an insurance is property; but that any interest in it may equally be insured. It is "property", then, in that wide sense of the word, which is regarded by the law of India as something which can be transferred by an act of assignment.

<sup>1</sup> "When equally at fault, the position of the defendant is the stronger." In such a case the Court must lean one way or the other. It leans towards the defendant.

<sup>2</sup> Whitley-Stokes. *The Anglo-Indian Codes*. Oxford, 1887, p. 726. By sec. 4 of the Transfer of Property Act it is provided that Chapters and Sections relating to contracts shall be taken as part of the Contract Act.

<sup>3</sup> See Appendix III.

The word "assign" has in modern colloquial usage many meanings. As a verb it generally means to "appoint", to "make over to", or to "attribute". As a noun the word now-a-days belongs to the law, and is an abbreviated form of the French *assigné* for which there is another English equivalent, namely, "assignee". The derivation is Latin.<sup>1</sup>

As terms of art the verb "to assign" and the noun "assignment" have reference in the law of property to a method by which property is transferred. By assignment property may be transferred without consideration, as in the law of gift; or may be made for consideration, as in the law of contract. The person to whom the assignment is made is styled the assignee. "Assign", as a verb, when used as a term of art, is one of general import like "grant". It is thought unnecessary in the present treatise to go outside its uses in respect of policies of insurance, and equally unnecessary, for the purposes of the brief study at which this chapter aims, to discuss the difficulties which formerly arose in India upon the subject of equitable assignments properly so-called; the fact being that, today, assignments of rights under policies of insurance are governed wholly by statute. The same is true of the power under which a holder of a policy of life insurance may "nominate" one or more persons to receive payment at his death. Nomination is an act revocable in its nature. An assignment, however, has the effect of directly transferring the rights of the transferor in respect of the property transferred, and thus is a transaction not to be undone except in due course of law. What is transferred by assignment of a contract, it is said, are its benefits and not its burdens.<sup>2</sup> The rights created by a policy of insurance belong in England to that species of incorporeal property styled in the language of the old law a *chose-in-action*. In the terminology of the law of India relating to property, that species is known as an "actionable claim". Thus we have it that the rights which are transferable in a policy of insurance are of that nature.

Assignment, then, is seen as but one method by which property is transferred. Other methods are by gift, by sale, and by devolution. In what way, then, may an assured's rights under a contract of insurance pass from him to another? In order that the student may understand the answer to this question, he must, at the outset, distinguish between three things. Connected with the contract of insurance are (i) the subject-matter (which, to use a phrase less easy to misunderstand, we may call "the property at risk"); (ii) the interest which the assured has in that property; and (iii) the right to enforce a claim under and by virtue of the policy. As already mentioned above, the word "assignment" is frequently used of a method by which one or more of these three species of "property" may be transferred.

**Transference of rights under Policies.**—The next step of importance for the student is to recall that a policy of insurance embodies a contract personal in its nature; for it creates an obligation to provide a named person with an indemnity for some loss which that person is in danger of sustaining. It follows that in contemplation of law an assured is, in theory, debarred from placing any one else in his position by any

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<sup>1</sup> From the two Latin words *ad* and *signo* which combined to form the Latin word "*assigno*". Sir Edward Coke wrote "assignee cometh of the verb *assigno*. And note there be assigns in deed, and assigns in law". (Co. Litt. 8b.)

<sup>2</sup> But see the effect in the law relating to insurance of the provisions of sec. 132 of the Transfer of Property Act discussed below.

unilateral proceeding. There is an exception to this principle. But that exception is the creation of the law merchant, and has reference to policies of marine insurance only. We may thus, for the moment, relegate any discussion of that exception till we have exhausted what needs to be said in regard to the application of the general rule of law.

Apart from statute, and save to such extent as the terms of the policy itself may permit, the general rule of law, then, debars an assured from transferring his rights without the consent of the other party to the contract. If and when such consent be obtained, the new contracting party who is substituted for the original assured comes in by what lawyers, appropriately enough, style a "novation".

For the foregoing reasons a mere sale of property, though transferring the interest therein does not, *per se*, transfer any rights under a pre-existing policy, *e.g.*, one of fire or burglary insurance. So, too, the mere creation of a mortgage or charge does not transfer any rights under such a policy. Thus, unless those rights be properly assigned, they remain as created by the original instrument. (*Garden v. Ingram*, [1852] 23 L.J. Ch. 478, 479.)

But the transference of property which is at risk under a policy, *e.g.*, a fire policy, is not without legal consequences affecting the contract of insurance; for, if a man has parted with all interest in the property at risk, he no longer possesses that insurable interest which the policy was created to protect. From the moment, then, when that interest has passed to another, his benefits under the policy are no longer enforceable either by himself or his successor. (*Ecclesiastical Commissioners v. Royal Exchange Assurance Corpn.*, [1895] 11 T.L.R. 476.) It is for these reasons that a transference of the benefits for which premiums have already been paid becomes desirable, and an assignment (as the most appropriate method) is called for.

Some writers use the word "assignment" of the devolution of the interest by operation of law. To do so is to use language not strictly accurate. For, what thus passes to the assured's personal representative on the former's death, or to the statutory authority on his becoming insolvent,<sup>1</sup> does so, not by assignment but by devolution in accordance with the relative substantive law; and what passes is not the assured's full benefit under the policy, but his right to sue upon it, if that right as, prior to such devolution, crystallized by reason of a loss the proximate cause of which is one of the perils insured against.

It is desirable, therefore, to make provision in the original policy for assigning the benefits thereunder if and when the occasion so to do arises.

Apt words are requisite to provide for anyone other than the assured himself acquiring under a policy anything more than a right to sue in virtue of an event which has already occurred. Such words will be strictly construed. Thus, where the promise was to pay the assured "his executors, administrators and assigns", the heir at law of the assured was unable to recover for a fire happening after the assured's death. (*Mildmay v. Folghan*, [1796] 3 Ves. 471.) Many modern fire policies

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<sup>1</sup> What is "Bankruptcy" in England is known as "Insolvency" in British India. In England the property of a bankrupt vests in the Trustee in Bankruptcy when a receiving order is made. In India, the corresponding authority is the Official Assignee in the Presidency Towns, and a specially appointed Official Receiver in an insolvency elsewhere. The relative statutes are the Presidency Towns Insolvency Act (III of 1909) and the Provincial Insolvency Act (V of 1920).

make suitable provision for the interest passing, but the practice is by no means universal. Where, therefore, a person desires the policy to be available to his heirs, administrators and assigns he must see to it that apt words be inserted. In many policies there are express conditions making provision for the circumstances under which all rights under the policy may be assigned. Such conditions usually guard against any assignment to which the insurer has not consented. Sometimes the wording of such conditions is such as would entitle an assured, on giving proper notice of an assignment, to compel the insurers to evidence their consent by endorsing the fact of the assignment upon the instrument itself. (*Re Birkbeck Permanent Benefit Building Society*, [1913] 2 Ch. 34.) Without such consent, a purported assignment is ineffectual. There is, of course, nothing to prevent an agreement to assign by a separate contract entered into for the purpose.

**Marine Insurance.**—As already observed, the intervention of the Law Merchant has created an exception to the general rule of English law that a policy of insurance is essentially un-assignable by unilateral action. In England, since *Sparks v. Marshall*, [1836] 2 Bing. N.C. 76, such an assignment has been regarded as valid whether executed before or after loss. The settled law is now embodied in section 50 of the English Marine Insurance Act, 1906, which reads as follows:—

“50. *When and how policy is assignable.*—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name, and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by endorsement thereon or in other customary manner.”

But the Law Merchant has not disturbed the general rule of English law that the mere sale of the property at risk does not operate so as to affect an assignment by implication. There must, at least, be an agreement to assign at or before the time when the interest passes. (*Powles v. Innes*, [1843] 11 M. & W. 10.) But, again, not even an agreement to assign is to be implied by the mere sale of the interest in the property at risk. (*North of England Oil Cake Co. v. Archangel Insurance Co.*, [1875] 10 Q.B. 249.)

Having thus discussed the general rule of law relating to the assignability of rights under contracts of insurance and the principal exception to that rule, attention will now be drawn to the statute law of India touching such assignments.

**The statute law in India.**—The statute law governing assignments of rights under policies of insurance is to be found partly in the Transfer of Property Act as amended to 1938 and partly in the Insurance Act of that year. The relative sections of the first-named statute are sections 130, 131, 132 and 135. These need to be read together and are in the following terms:—

“130. *Transfer of actionable claim.*—(1) The transfer of an actionable claim whether with or without consideration shall be effected

only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

*Exception.*—Nothing in this section applies to the transfer of a marine or fire policy of insurance, or affects the provisions of section 38 of the Insurance Act, 1938.

131. *Notice to be in writing, signed.*—Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

132. *Liability of transferee of actionable claim.*—The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

135. *Assignment of rights under marine or fire policy of insurance.*—Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself."

It is to be observed that the normal rule whereby only the benefits of a contract are assigned, but not the burdens, would seem at first sight to have been departed from by the provisions of section 132 of the Transfer of Property Act. But the rule itself is subject to the qualification that where the contract is still executory, the assignment involves a delegation of performance to the assignee. So if an assured, who has given notice of an assignment, does not keep up the premiums, the liability to do so will devolve upon the assignee if he seeks to enjoy the ultimate benefit of the policy. It is to be noted also, upon the subject of the validity of an assignment that a conditional assignment by way of security is valid: (*Venkatachalam v. Subramania*, [1912] M.W.N. 461; *Muthukrishnair v. Veeraraghava Iyer*, [1915] 38 Mad. 297, F.B.). It is said that no particular form of words is required, and that so long as the language is sufficiently clear to disclose the intention of the parties, the assignment will be effectual. (*Rana Ayen v. Venkatachallam Patter*, [1907] 30 Mad. 75; *Nanak Chand Kishorilal v. Ram Sarup Gujarmal*, [1924] 78 I.C. 163.)

**Form and effect of notice.**—The important case of *Sadasook Ramprolap v. Hoare Miller & Co.*, [1923] 27 C.W.N. 733 decided several questions upon the subject of a proper notice. It seems that there must be a strict compliance with section 121. It had already been decided in two Bombay cases that a notice which did not give the address of the assignee was bad. In the Calcutta case a notice, equally defective as to the real address of the transferee, but which gave the name and address of his solicitor, was held insufficient. In the latter case the topic of waiver arose. Rankin, J., expressed the view that if there had been an offer to give the transferee's address in writing and the debtor had made it plain that he attached no consequence to it and would not rely upon the omission, the debtor would have been bound. The view of the present editors<sup>1</sup> of Mulla's *Transfer of Property Act*, that a debtor may become, not only by parol but by conduct, a party to the assignment, as in the instance suggested by Rankin, J., appears to be correct. In *Gopalakrishna v. Gopalakrishna*, [1910] 33 Mad. 123, the Court inclined to the opinion that a notice might be conditional. It is submitted that this is not so. A conditional notice would largely defeat the intention of the statute which is to give information to the debtor upon which he can act without being put upon enquiry.

It will be noticed that the provisions of the foregoing sections of the *Transfer of Property Act* are less concerned with the substantive than the adjective law of assignment. It is not the right of a party to assign which is provided for, but the manner in which one who has that right may put it into execution so as to give validity to his acts. The provisions of section 130 are expressly made inapplicable to marine or fire policies; and the reference to section 38 of the *Insurance Act, 1938*, has the effect of excluding the assignment of life policies also.

**Life policies.**—It is section 38 of the last-named statute which regulates assignments of life policies. By sub-section (6) thereof, the provisions of the section are not to operate retrospectively: that sub-section expressly preserving any rights or remedies of an assignee or transferee under an instrument executed prior to the commencement of the Act, i.e., before July 1, 1939.

The relative provisions are as follows:—

“38. (1) A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness specifically setting forth the fact of transfer or assignment.

(2) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but except where the transfer or assignment is in favour of the insurer shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment together with either the said endorsement or instrument itself or a copy thereof certified to be correct by or on behalf of both transferor and transferee has been delivered to the insurer.

Provided that where the insurer maintains one or more places of business in British India, such notice shall be delivered only at the place in British India mentioned in the policy for that purpose or at his principal place of business in British India.

(3) The date on which the notice referred to in sub-section (2) is delivered to the insurer shall regulate the priority of all claims under a transfer or assignment as between persons interested in the policy; and where there is more than one instrument of transfer or assignment the priority of the claims under such instruments shall be governed by the order in which the notices referred to in sub-section (2) are delivered.

(4) Upon the receipt of the notice referred to in sub-section (2), the insurer shall record the fact of such transfer or assignment together with the date thereof and the name of the transferee or the assignee and shall, on the request of the person by whom the notice was given, or of the transferee or assignee, on payment of a fee not exceeding one rupee, grant a written acknowledgment of the receipt of such notice; and any such acknowledgment shall be conclusive evidence against the insurer that he has duly received the notice to which such acknowledgment relates.

(5) Subject to the terms and conditions of the transfer or assignment, the insurer shall, from the date of the receipt of the notice referred to in sub-section (2) recognise the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

(6) Any rights and remedies of an assignee or transferee of a policy of life insurance under an assignment or transfer effected prior to the commencement of this act shall not be affected by the provisions of this section.

(7) Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life time of the person whose life is insured and an assignment in favour of the survivor or survivors of a number of persons, shall be void."

**Effect of Assignment.**—An assignment of a policy operates so as completely to divest the assignor of any right under it. The essence of an assignment is its completeness. (*Rayner v. Preston*, [1881] 18 Ch.D. 1, 7, C.A.) If he retains any interest in the subject-matter of a purported assignment it will be ineffective, and the interest in the policy will remain with the assured. (*Collingridge v. Royal Exchange Assurance Corpn.*, [1877] 3 Q.B.D. 173, 177.)

**Nomination.**—The topic of nomination belongs to the realm of life insurance. The relative adjective law is to be found in section 39 of the Insurance Act, 1938. As the topic is wholly confined to law relating to policies of life insurance, its discussion is relegated to a later chapter of this treatise.

### 10. Risk and Loss.

Risk and loss are words of somewhat technical significance as applied in the law relating to insurance. The meanings may be said slightly

to vary with the context in which they are found used, and it seems better, therefore, to treat these topics with special reference to each class of insurance as it falls to be discussed in the later chapters of this treatise.

### 11. *The Rule of Good Faith.*

The origin and general extent of the doctrine of *uberrima fides* ("the utmost good faith") has already been noted earlier in this treatise.<sup>1</sup> Its peculiar importance to contracts of insurance, whether marine or non-marine, has now to be insisted upon and its applicability to particular circumstances explained. It is as old, and indeed older, than Lord Mansfield's celebrated exposition of the doctrine as applied to insurance in *Carter v. Boehm*, [1766] 3 Burr. 1905, 1909—a case concerned with a contract which to-day would be treated as largely one of insurance against fire or burglary. "Insurance" said he "is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void." The universality of the doctrine is thus stated in *London Assurance v. Mansel*, [1879] 11 Ch. D. 363, *per* Jessel, M.R., at p. 367: "As regards the general principle, I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine insurance, I take it good faith is required in all cases, and though there may be certain circumstances from the peculiar nature of marine insurance, which require to be disclosed and which do not apply to other contracts of insurance, that is rather in my opinion an illustration of the application of the principle than a distinction in principle." It is sometimes forgotten that the doctrine applies to both parties to a contract of insurance and their respective agents, and extends throughout the period of negotiation, but not after the policy has been executed and issued. It applies equally to contracts of re-insurance. Where an assured seeks to modify in his favour any of the terms of an existing contract, the duty of disclosing any material circumstance arising since the execution of that contract re-attaches. (*Lishman v. Northern Maritime Insurance Co.*, [1875] 10 C.P. 179.) The same case decides that it is otherwise where the alteration proposed is for the benefit of the insurers.

The nature of the disclosure requisite under the doctrine includes not only every material fact within the knowledge of the assured, but any material fact which a person seeking to obtain the advantages of the particular protection, ought, in the ordinary course of business to know, and the knowledge of which will for that reason be imputed to him. (*Proudfoot v. Montefiore*, [1867] 2 Q.B. 511, 521; *Blackburn Low & Co. v. Vigors*, [1887] 12 A.C. 531, 537.) It is a question of fact in every case whether an assured does or does not know a fact said to be material, and whether he could reasonably be expected to know that fact at any material time or times. (*Joel v. Law Union & Crown Insurance Co.*, [1908] 2 K.B.

<sup>1</sup> See p. 18, *ante*.

863, where Fletcher-Moulton, L.J., at p. 884, points out that there is no duty to disclose what an assured does not and could not reasonably be expected to know.) The rule, however, by which an assured is to be presumed to know certain facts extends to a situation in which an assured's ignorance is attributable to a deliberate failure to make inquiries reasonably to be expected of him. (*Per* Lord Halsbury, in *Blackburn Low & Co. v. Vigors*, [1887] 12 A.C. 531, at p. 537.)

It is often said, moreover, that the knowledge of the agent is to be imputed to the principal, and that concealment of something by the agent from the principal will not avail the latter as a defence to a plea of non-disclosure. Lord Halsbury in the case just cited (at p. 537) thus distinguishes the situation where such knowledge is rightly to be imputed to the principal, from others where it would be bad law to do so: "When a person is the agent to know, his knowledge does bind the principal. . . . I cannot but think that the somewhat vague use of the word 'agent' leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge and intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received. . . . To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word 'agent' that plausibility is given to reasoning which requires the assumption of some such proposition."

So far back as *Moens v. Heyworth*, [1842] 10 M. & W. 147, 157, the doctrine of good faith in the matter of disclosure was said not to impose a duty to disclose each and every circumstance which related or might relate to the insurance, but only every *material* circumstance: the test of materiality being whether the circumstance relied upon as vitiating the contract by non-disclosure would, if known, at the material time, reasonably have affected the minds of prudent and experienced insurers in deciding whether they would enter into the contract or, in the case of acceptance of it, in fixing the amount of premium. (*Bridges v. Hunter*, [1813] 1 M. & S. 15; *Seaton v. Burnand*, [1900] A.C. 135, 140; *Dawsons Ltd. v. Bonnin*, [1922] 2 A.C. 413, 433.) For an example of how a fact may become material after the date of the contract of insurance, yet, because it was immaterial at the date of such contract, the policy is not avoided by its non-disclosure, see *Associated Oil Carriers v. Union Insurance Society of Canton*, [1917] 2 K.B. 184.

A discussion of this branch of the doctrine would be incomplete without pointing out that a fact, immaterial in itself, does not lose that character merely because, had it come to the knowledge of the insurers, they might have pursued inquiries and have been led to the discovery of other facts which were themselves material. (*Joel v. Law Union & Crown Insurance (supra)* at p. 883.)

An assured may, however, be excused from communicating facts or circumstances of which he may reasonably presume the insurers to have knowledge, or of which, with diligence, reasonable in the circumstances, they could acquire knowledge without further aid than his existing disclosures may have afforded. For examples of the application of this

common-sense rule, see *Carter v. Boehm*, [1766] 3 Burr. 1905; *Mackintosh v. Marshall*, [1843] 11 M. & W. 116; *Bates v. Hewett*, [1867] 2 Q.B. 595; *Lenn v. Hall*, [1923] 16 Ll. L.L.R. 100; *Seaton v. Barnard*, [1900] A.C. 135.

Included in facts which insurers may be presumed, in the ordinary course of their business, to know, are matters of law. (*The Bedouin*, [1894] P. 1, 12, C.A.) The assured is not bound to disclose information, where he may reasonably infer that the insurers attach no importance to it. (*Laing v. Union Marine Insurance Co.*, [1895] 1 Com. Cas. 11, 15); nor information which the insurers have waived. But such waiver is not lightly to be presumed. (*Greenhill v. Federal Insurance Co.*, [1927] 1 K.B. 65, 85.) Finally, facts the disclosure of which would lessen the risk are not within the doctrine of disclosure at all. (*Carter v. Boehm* (*supra*) at p. 1910), any more than are those which some express condition in the policy has rendered unnecessary. (*Ross v. Bradshaw*, [1760] 1 W.Bl. 312, 313; *Haywood v. Rodgers*, [1804] 4 East 590.)

Although Lord Mansfield in *Carter v. Boehm* (*supra*), speaks of the effect of concealment as rendering a contract "void", such a statement is no longer in accordance with modern judicial opinion; nor does it accord with the language of the Indian Contract Act. The effect of deliberate concealment (amounting to fraud) or of non-disclosure (amounting to a breach of the implied condition to exercise the utmost good faith) is the same, namely, to render a contract "voidable" at the option of the other party. This state of things involves, by necessary implication, that the aggrieved party may, if he chooses, waive his rights and affirm the contract.

## CHAPTER IV

### MARINE INSURANCE

1. Preliminary:—Certain nautical terms. 2. Shipping:—Ship-owner and charterer—Charterparties—Bills of lading—Liability of Owners and Charterers under bills of lading—Certain technical terms. 3. Nature of marine insurance:—Definition of contract—Classification of policies—Other documents evidencing the contract—The Memorandum or Slip and the Cover-note—Effect of the Indian Stamp Act—Rectification—Correction. 4. Construction of the contract:—Canons—Special rules—What Law to be applied—Conflict of Laws. 5. Subject of the contract:—Lawful Marine Adventure—Insurable Property. 6. Form and substance of the policy:—Specimen policy—Recital—General clauses—“Touch and Stay” clause—“Perils assumed” clause:—“Of the Seas”—“Fire”—“Pirates”—“Rovers”—“Assailing thieves”—“Jettisons”—“Barratry”—“All risks”—“Sue and Labour”—“Waiver” clause—“The Memorandum”—“Payment”—“Deviation” clause—“Deck cargo”—The Warranties:—“F.C.S.” clause—Institute “deviation” clause—“Drugs”—“F.P.A.” clause—Warranty of neutrality—Divers other warranties; Implied warranties:—Sea-worthiness—Legality—Warranties not implied:—Nationality—Goods and moveables—“Inchmaree” clause—Collision or “running-down” clauses—Various special clauses—Inland water-way clauses. 7. Common Carriers. 8. Multiple insurance:—Floating policies—Additional insurance—Double insurance—Over-insurance—Insurance by different persons—Overlapping policies—Re-insurance. 9. Disclosure. 10. Loss and abandonment:—Actual total loss—Successive losses—Constructive total loss—Ademption—What may be lost—Loss of freight. 11. “Honour” policies. 12. Assignment. 13. Subrogation. 14. Measure of indemnity:—Partial loss of ship—Partial loss of freight—Partial loss of goods—Apportionment of valuation—“New for old”. 15. Liabilities to third parties. 16. General average contribution and salvage charges. 17. Salvage. 18. Under-insurance. 19. Return of premium. 20. Settlement of losses. 21. Broker’s lien. 22. Commercial usage in India. 23. Mutual Insurance.

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#### 1. Preliminary.

The topic of marine insurance has already been touched upon in previous chapters of this treatise. It is the aim of the present chapter to present the subject as a whole, and in so doing the author has striven to bear in mind what he conceives to be the particular difficulties which may strike the Indian student of the subject. Though the Indian peninsula has an immense coast line and a number of important harbours, only a very small fraction of the population have any such contact with the sea as would be helpful to them in forming a real conception of its perils, or as would enable them at all easily to visualize the character

of modern ocean transport. This state of things is largely referable to the paucity of any literature in the Indian vernaculars dealing with man's adventures upon the sea, and to the lack of suitable books of public reference, save in such places as Calcutta, Bombay, Madras or Karachi.

The steady growth, however, of Indian commercial enterprise, and with it the growing importance of India's overseas trade, make it imperative that the Indian student and the Indian practitioner in the law should lose no opportunity of familiarizing themselves with such detail of modern sea-faring life as will enable them to understand the relevant facts which form the background of every controversy which is concerned with maritime insurance.

It will thus perhaps be useful to remind the reader once again that the Insurance Act of 1938 has given an opportunity to Indian policy-holders generally to have any controversy between them and their insurers decided according to the law of India. That law, as already pointed out, is in no sense codified. While on the one hand the Indian Contract Act may be referred to as establishing certain principles applicable to all Insurance contracts, the special law relating to marine insurance must be gathered from that *corpus* of judicial decisions which has in England formed the basis on which the present English Code has been erected.<sup>1</sup> In so saying the writer must be understood to mean no more than that Indian judicial opinion will, it is conceived, apply the doctrines underlying English decisions so far as the same do not conflict with any existing Indian authority. It is conceived also that the Courts in India will continue to have regard to the custom of merchants in a branch of the law which has continuously derived so much from that source.

At the outset it will perhaps be helpful to the Indian student if some reference be made to a number of technical terms and common expressions which constantly occur in evidence in shipping cases. Some may be conveniently described as nautical, others as belonging to the language of commerce and particularly used in connection with the carriage of goods by sea.

**Certain Nautical Terms.**—While the sea-going vessel or large-scale river craft propelled by steam power or by electricity has to a great extent banished the sailing vessel of former days, whose tall masts and tapering spars at one time constituted the most striking feature of every port town, the language of those who could then have called themselves "sailors" in the strict sense of that word is still the language of sea-faring Britishers today. Thus when the modern steamship sets forth upon her journey she is said to "sail", though not an inch of canvas is there to assist her movement! The ship itself too, no matter how propelled, is never spoken of in the neuter but always in the feminine gender.

**The Master and his Crew.**—The science of navigation was from very early times looked upon as a craft or "mystery", and the seaman who acquired recognized proficiency in it was long ago spoken of as a "Master-Mariner", a term which survives throughout the British Empire to-day, and which officially describes one who has passed the requisite tests and finally obtained a Board of Trade Certificate entitling him to command and navigate a sea-going vessel. In commercial shipping documents

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<sup>1</sup> What is here and hereafter referred to as the English Code is the Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

such as bills of lading or policies of marine insurance he who commands the ship is usually and properly referred to as its "Master".<sup>1</sup>

The Master has as his second-in-command a seaman who, in the modern world, is expected to be as proficient in navigation as the Master himself. Such an one, when second-in-command of a merchant vessel, is known and styled as his Mate (or sometimes "first" or "chief" officer). Where a vessel carries more than one such additional officer capable of navigating the vessel, they will be styled in order of seniority second, or third Mate, etc., or correspondingly second, third or fourth officer, etc., as the case may be. A modern steamship requires a complete engineering staff over which is posted a Chief Engineer. Like the navigating staff there may be a number of subordinate officers each capable either wholly or to a limited extent of taking the place of "the chief". The working people of a merchant ship are collectively styled its "crew" or, in more homely sea-faring parlance, "the hands". Those of the crew immediately concerned with "keeping watch" at sea or in port, with the "dropping" or "weighing"<sup>2</sup> of the anchor and with "making fast" the ship to a buoy or alongside a jetty or pier or correspondingly carrying out the duties necessary to "casting off", are styled "deck-hands".

*The parts of a vessel.*—The floors of a vessel are styled her "decks". A modern ship has many decks, e.g., "upper or top deck", "main deck", "lower deck", "boat deck" and (in warships) a "quarter deck". In vessels designed for large-scale passenger traffic the domestic decks are often distinguished by letters of the alphabet. The right side of a ship is styled the "starboard" side. Till fairly recently, i.e., till the 19th century was some way advanced, the ship's left side was styled her "larboard" side. Today it is called her "port" side. Thus a ship turning to right or to left is said to "turn to starboard" or "to port". The ship's crew is still roughly divided into what are termed "watches" known respectively as the starboard and port watches. In the past they were correspondingly accommodated in the vessel. They are housed now-a-days mostly in the bows, and in a part of the ship styled the "forecastle".<sup>3</sup> When one watch is doing duty the members of the other watch have a spell of rest.

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<sup>1</sup> It is, however, now-a-days customary to refer to the commander of a merchant ship by the title of "Captain". Such a designation is less official than social and complimentary, unless the officer referred to in fact holds the rank of Captain in one or other of the Naval Forces of the Crown, e.g., the Royal Naval Reserve. In some standard forms of Charterparty the Master is now-a-days designated Captain. The origin of this rank in the Navy is of interest. In essence the Navy grew out of, and owed its sea-faring reputation to, the daring of the ordinary merchant seaman. In early times the Crown chartered and in some cases commandeered one or more stoutly built and serviceable merchant ships and then armed them with a number of cannon, and finally put on board for purposes of warfare a company of ordinary soldiers under the command of their company officer, who was always styled the "Captain". Thenceforward a man-of-war housed the Captain and his "company" of soldiers, as well as the Master of the ship with his "crew". The Master and crew respectively navigated and "worked" the vessel, while the Captain and his company—to use their own language—were there to "fight" the ship. In course of time the phrase "the ship's company" came to be used collectively of everyone aboard a man-o'-war. Ships of the British navy, however, continued to be navigated by a Master until well on into the 19th century, when he became supplanted by an officer who, though he had a military training, had ultimately specialized in navigation. He is today designated in the ship's books as the Navigating Officer.

<sup>2</sup> Meaning "heaving up" the anchor; a process which when carried out by manual effort alone caused the seamen to feel its "weight".

<sup>3</sup> Pronounced "fokeals".

Everything in front of the navigating bridge is known as the "fore" part of the vessel, and the area immediately behind that bridge is regarded as "amid-ships". Behind that again is the area styled the "after" part of the vessel. In sailing vessels the ship is navigated from the after-part which is raised above the line of the main deck and is styled the "poop". The narrowest part of the vessel at its fore end is called the "bows"<sup>1</sup>; the vertical part of the frame which first meets the water is known as the "stem". The ship's rear end is styled her "stern". When the ship turns completely round she is said "to go about". The shorter axis of the vessel is referred to for the purposes of measurement as her "beam". When a ship is described as "on her beam ends" the situation depicted is that of a ship lying on her side.

When a ship is in movement—or, as sailors say, is "under way"—her ordered progress is either "going ahead", i.e., forwards, "going astern", i.e., backwards, or "turning". As already explained, when a ship turns completely round she is said to "go about" or be "put about". Her progress when at right angles to a line of waves or to a coast is described as going "head on" to the sea or the shore, as the case may be. It sometimes happens, however, that the forces of nature when taking control of a ship's movement cause her to "veer", i.e., to deviate suddenly from her proper direction. When this results in bringing the ship's longer axis parallel to the lines of the waves she is said to "broach-to". This is a position often fraught with danger, since the first effect when under the influence of high waves is to make the ship oscillate or roll over a considerable and, possibly, ever-widening angle. Where the forces of wind and sea are acting together in the same direction a badly balanced vessel may, unless speedily steadied, be rolled right over and so be made to "founder", i.e., to become completely submerged. A similar catastrophe may be brought about by the cargo shifting during one or more of the rolls, so as to throw the vessel dangerously off her centre of gravity. A vessel which in one or another way is seen to be permanently leaning away from her centre of gravity is said to have a "list" to port or to starboard, as the case may be. A further danger arising from thus shifting the cargo is that, from the nature of the material carried, the sides of the ship may become so damaged as eventually to let in the sea water. A ship thus failing to remain water-tight is said to have "sprung a leak".

The body or frame of a ship (without masts, spars, or funnels and often without the whole of its super-structure, i.e., without such parts of the vessel as eventually appear above the line of the upper deck) is in strictness comprised in the word "hull". In policies of Marine Insurance, however, the word "hull" includes every structural part of the vessel except such as is used for the purposes of propulsion, i.e., masts and spars in the case of a sailing ship, to which must be added the engines, boilers, etc., in a mechanically-driven vessel. The term *ship*, in a policy upon a steamship, covers the machinery as well as the hull. As will be seen hereafter, in Valued Policies on steamships, hull and machinery are commonly made the subject of separate valuation.

The chimneys of a vessel are sometimes referred to as her "smoke stacks" but more commonly as her "funnels". A ship's kitchens are known as "galleys". On modern steamships ventilation of the space below and between decks is effected by special ventilating shafts or

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<sup>1</sup> Sometimes also called the "head", e.g., in the phrase "bring her head to the wind" meaning, turn the ship into the wind's eye.

pipes so designed as to be capable of being turned in the direction of the wind. They are often referred to as "cowls", from the resemblance they bear to certain old fashioned head-gear.<sup>1</sup>

Merchandise, when delivered to a ship for carriage, is in sea-faring language styled "cargo". Cargo when packed into the ship is said to be "stowed" there; those parts of the ship which have been specially designed for the reception of her cargo are known as "the holds". Large modern vessels have a number of such holds with special hoisting apparatus appropriately placed so as mechanically to lower into or haul up the cargo, as the case may be. It often happens that a certain kind of cargo cannot be conveniently stowed in the holds of a ship, or for one reason or another is not intended to be stowed there. Cargo for which space is thus found on deck is known as "deck cargo".<sup>2</sup>

*The log.*—The Master of a modern ship is required to keep an official diary. This is known as the ship's "log".

*Navigation.*—The vessel is steered, and her path across the ocean aided, by that oldest of navigating instruments, the compass, which is so framed, glazed and artificially lighted that it can be read at any time of the day and night and in all weathers. When so housed and lighted the apparatus is styled the "binnacle". Modern sea-going regulations require periodical and prescribed tests for the accuracy of such compasses. Every modern vessel is required to carry a number of maps (known as "charts") whereon coastlines, shore-lights (such as light houses) and light-buoys as well as the position of light ships are shown, as are also numerous measurements indicating the depth of the sea at such points as the navigator would find it particularly useful to know.<sup>3</sup> British ships are obliged to carry charts issued by the head-quarters of the Royal Navy—a government office known as "the Admiralty", under which works a special branch responsible for unremitting survey of the ocean and of coastal waters. Every modern merchant vessel is fitted with a special room in immediate connection with the navigating bridge. This is known as the "chart room"; and here upon an appropriate type of table the relative charts are spread whereon the "course" or path of the vessel is marked and its progress checked. The vessel's "position" is daily "worked out" and plotted on the chart by aid of an instrument for taking an observation of the sun or other celestial bodies.

The mechanical duty of steering the vessel is performed by picked seamen, who, in British merchant ships, are often known as "Quarter-Masters". It is they who regularly take their turn at the spoked wheel which is to be found on, or immediately adjacent to the navigating bridge, and in front of the Chart house.

Most modern vessels have fixed upon their front or "fore"-mast a specially designed "look out", wide enough to accommodate two men. This is usually at a height somewhat above the line of the ship's funnels so that when the vessel is going "astern" its occupants would not have their vision obscured by the smoke. Here those members of the duty watch who have been detailed for "look out" work have to stand when

<sup>1</sup> The Benedictine Monk uses an outer-garment known as a "Cucullus", which has been translated by the old English word "cowl". This has attached to it a small hood capable of being pulled over the head from the back of the neck. The ventilating "cowl" of a ship is similarly bent over so as to protect the air shaft from rain.

<sup>2</sup> So passengers for whom no cabin accommodation is provided are styled "deck passengers".

<sup>3</sup> Known as "soundings".

the vessel is "under way" at sea. A vessel's navigation is from time to time aided, when in supposedly shallow waters, or when attempting to follow a difficult and changing channel in the estuary of a river, by the casting into the water from one or both of the ship's sides of a leaden weight attached to a thin rope measured off into fathoms. In seamen's language, this process, which is designed to "sound" the distance between the surface and the bed of the sea or river at the point where the measurement is taken, is styled "heaving the lead". The most useful place for a man "heaving the lead" was long ago found by experience to approximate to where the big chains to which the anchor was attached were stowed when the ship was at sea. That position was always known as "the chains"; and the man was said to be "standing in the chains". The same words are used today for the man's position in a big modern vessel although he usually stands on a small platform which projects over the ship's side at a point in front of the line of the navigating bridge, so chosen that those on that bridge can in ordinary weather hear the measurement which the man calls each time his lead touches the bottom.

*Time.*—A ship's time is to-day checked by specially designed chronometers, but is announced to the ship's company or crew by striking a bell in accordance with an age-long tradition of sea-faring life, well-settled with the British before anything like the modern clock was invented. The working day and working night are divided into "watches". The ship's bell is struck to mark the passing of each half-hour of a watch.

*Lights.*—At night a modern vessel is obliged by regulation to maintain certain lights burning brightly when at sea and under way, and others when at rest in harbour or elsewhere. When under way a bright green light must be so placed on the starboard side that it can be read by anyone on the line of the ship's progress or away on the ship's starboard beam. A light equally well-placed but of a red colour must be maintained on the port side of the vessel. When anchored, or tied up in port, these lights are not maintained but a special light swinging between the fore-mast and the ship's bows must be kept burning. This is known as the "riding light".

*Pilotage.*—From almost immemorial times the inhabitants of places connected with a harbour difficult of navigation have found a ready means of livelihood in offering their services to vessels visiting their shores. Those who have become recognized local navigators for such a purpose are known as "pilots". And in the modern world today the post of a pilot is a much coveted position. The office is well-paid and ranks as an honourable calling. The great value in terms of money of a modern ocean-going vessel (even without her cargo) has led in course of time to rules whereby a Master of a ship approaching anything but an extremely safe port is bound to take on a pilot, and to place him temporarily in charge of the vessel's navigation till a prescribed point is reached, when the pilot may be dropped. In some ports, of which Calcutta is an example, the regulations of the Port Authorities require that after the pilot is dropped, on entering the relative area and reaching the prescribed point, the vessel must be handed over to a special navigator maintained by the Port Authority for the purpose of moving vessels in and out of docks or to and from moorings.<sup>1</sup> A vessel is said to be "moored" when she is tied up to one or more buoys, and to be "alongside" a dock or wharf when she is actually made fast by ropes

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<sup>1</sup> These local navigators work under an official of the Port styled the Harbour-Master and themselves are known as assistant Harbour-Masters.

(styled "hawsers") to the side of the dock or wharf as the case may be. The prescribed position for a vessel in a harbour, whether within a dock or within a line of fixed moorings, is styled the ship's "berth"; and she is said to be "in her berth" or "berthed" from the moment when she has been properly and safely secured in the prescribed position.

*Loading and discharging cargo.*—When a vessel is taking in cargo at a port she is described as being in process of "loading"; when cargo is being taken out of her she is said to be "discharging".

## 2. Shipping.

The subject of marine insurance is so intimately bound up with the circumstances under which merchandise is customarily carried over the world's waterways that the student will need some acquaintance with modern methods of carrying goods by sea if he is to understand the part which marine insurance plays in the commercial life of the world today. But what is said below upon the topic of carriage of goods by sea, must be understood as attempting to provide the student with no more than a brief sketch of modern usage, designed to afford him a sufficient background for such study of the principles of marine insurance as the present chapter offers him. Inevitably, the student must familiarize himself with yet a number of other terms having wholly or partially acquired special or technical meanings in relation to shipping. These terms will be found cropping up again in our discussion of contracts of marine insurance; and inasmuch as a considerable volume of water-borne merchandise passes to and fro upon the great navigable rivers of India, the extent to which such traffic is insured in a manner similar to that which has been evolved for the needs of ocean-going traffic is a subject which the student of insurance law in India must not overlook.

A modern ship may be built of any material found by experiment to be suitable, and ships are afloat today some built of wood, others of steel, and a few of reinforced concrete. The material of which a ship is constructed governs, to a large extent, what she may be considered capable of accomplishing, not only in the matter of speed, but of resistance to weather conditions and to deterioration by the corrosive effect of sea water. It naturally also determines her reactions to "stranding".<sup>1</sup>

A considerable—perhaps the major—part of that local traffic which is to be classed as "coastal", is throughout the world still worked by sailing ships. Certainly most of the coastal fishing trade the world over makes use of sailing craft.<sup>2</sup> Many maritime states, such as the Scandinavian countries,<sup>3</sup> continue to use sail for certain classes of traffic, and accordingly employ sailing ships for the purpose of training boys both for the navy and for the superior merchant service. There are still upon the oceans of the world a number of sailing vessels of considerable

<sup>1</sup> This word means the action of a ship in going ashore—i.e., allowing the major portion of her weight to be borne by earth instead of water. In some instances a ship may be saved from destruction by so coming to rest upon a sea shore. In most instances, however, the act of stranding a vessel is accompanied by considerable damage to her structure, and often enough, ends in her complete wreck.

<sup>2</sup> The recent cheap production of small internal-combustion engines is gradually making it possible for fishermen to fit motors to their craft for the purposes of auxiliary propulsion. But steam trawlers working outside territorial waters, as well as fishing craft fitted with auxiliary motors, continue to make use of sail wherever weather conditions make the same advisable.

<sup>3</sup> Norway, Sweden, Denmark, and Finland.

tonnage used for voyages in which the element of time is of relatively little importance, *i.e.*, in the grain trade; but it seems that their number is dwindling. Of private sailing vessels built for pleasure cruising there are still large numbers in which sail is the only means of propulsion. Many of these craft are capable of ocean travel. The great mass, however, of ocean-going traffic is in the hands of ship-owners whose vessels are propelled by steam and who use coal or oil as fuel. A small minority of ships are electrically driven.

In most ships, mechanically propelled, electricity is used for lighting and often for ventilating purposes. The use of wireless apparatus both for the transmission and for the reception of messages is almost universal in ocean-going ships. Some merchant vessels and the warships of most nations are fitted with additional apparatus for under-water transmission of messages. Sound signals by way of warning to other vessels, *etc.*, are made by steam whistles of various types known as "fog horns" and "sirens".

The governments of most maritime nations have now-a-days in operation statutory regulations concerning the safety of vessels registered in their ports or sailing under their flag,<sup>1</sup> whereby the degree to which a vessel may be safely loaded is to be the subject of special tests and of legible markings on the ship's side. Such regulations usually prescribe also the number and character of life boats which vessels of particular classes, or employed upon particular services, must carry. The provision of life-belts for crew and passengers is another matter with which such regulations concern themselves. A considerable measure of agreement has been arrived at by conference between maritime powers, as a result of which there has been achieved a good deal of standardization, not only concerning safety at sea, including an agreed "rule of the road", but reciprocal obligations are now-a-days admitted and honoured touching such questions as going to the aid of vessels in distress.

**Shipowner and Charterer.**—The provision of vessels for the carriage of passengers, live-stock and merchandise of all sorts, and their operation, is now-a-days a trade in itself. The necessary capital is usually found by one or more persons entering into a partnership; and more frequently by that extension of the concept of partnership which has culminated in the creation of the joint-stock company. Persons so trading are in mercantile documents referred to as the shipowners, or simply as the "owners". A ship may ply on behalf of its owners only, or it may wholly or in part be hired out by them to someone else for the purpose of a particular voyage or adventure. A vessel so placed at the disposal of someone who is not the owner is said to be "chartered"; and the legal instrument by which the use of the vessel is thus secured to the charterer is known as a "charterparty". While a charterparty transfers the use, and in some cases the possession and control of the vessel, the true or general ownership is not affected.

It is obvious then that the carrier of goods may either be the shipowner directly entering into contracts of carriage with those who desire to be carried, or to have animals or goods carried, or may be a charterer of the whole or part of a vessel.

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<sup>1</sup> Maritime nations regularly use a special flag, generally named an "ensign", for use of merchant ships as distinguished from vessels of their navy which fly yet another flag or ensign. These ensigns are officially notified to all countries. On steamships this flag or ensign is to be found flying from a short mast at the vessel's stern.

**The Charterparty.**—Charterparties are divided into Charterparties Proper and Charters of Demise: the former being again divisible into Time-charters and Voyage-charters. It is a matter of construction as to within which category the instrument falls. The courts, however, will, to some extent, look at the surrounding circumstances for the purpose of determining the intention of the parties. It was noticed in a decision of the Court of Appeal in England at the beginning of the present century (*Herne Bay Co. v. Hutton*, [1903] 2 K.B. 683, 689) that it was but "very rarely that a Charterparty contained a demise of a ship". In a much later case (*Page v. Admiralty Commissioners*, [1921] 1 A.C. 137) the main test for discovering whether a demise was intended was said to be the position of the Master of the vessel, namely, whether he was shown as the servant of the charterer or of the shipowner. Under a charter of demise, then, the Master of the ship becomes the servant and agent of the person who has acquired the exclusive use of the vessel, i.e., of the charterer. This situation has important effects. Thus in *Baumvöll, etc. v. Furness*, [1893] A.C. 8, the charterparty provided for the hire of the vessel for four months. The charterer was responsible for the pay of the Master and crew and was to provision the ship for the whole period of hiring. The charter being construed as a demise, the shipowner was held not liable to shippers, who were ignorant of the charter, for the loss of goods shipped under bills of lading which the Master had signed.<sup>1</sup> A much earlier case presents nearly the converse of the situation depicted above. In *Sandeman v. Scurr*, [1866] 2 Q.B. 86, the charterparty gave the Master power to sign bills of lading at any rate of freight without prejudice to the charter. Goods were shipped by persons without knowledge of the charterparty under bills of lading which the Master had signed. It was held that the charter did not amount to a demise, and that the shipowner was bound by the Master's signature.

By an ordinary charter, or what may be termed a charterparty proper, the charterer obtains the right to the use of the vessel and the services of the Master and crew for the purposes of the adventure or adventures named in the instrument and for the conveyance of the goods; but the shipowner does not thereby relinquish either his possession or his control of the vessel (*Manchester v. Furness*, [1895] 2 Q.B. 639; *Wehner v. Dene Steamship Co.*, [1905] 2 K.B. 92; *Sandeman v. Scurr* (*supra*)). The same form of instrument is employed where the object is to obtain the use of a part only of a given vessel together with the services of Master and crew in respect of any goods which the charterer proposes to carry in the part so hired.

As the ownership, the possession, and the control of the vessel remain vested in the shipowner under a charterparty proper, he may sell or mortgage the ship during its currency. Where this happens, the purchaser with notice of the charterparty, cannot, it seems, use the vessel as a free ship; and may be restrained by injunction from so dealing with her as to frustrate or interfere with her employment and use in accordance

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<sup>1</sup> By this charter the shipowner had reserved a power to appoint a Chief Engineer, and he had made himself responsible for the insurance of the ship and for her maintenance. The Court, however, had no difficulty in deciding that, inasmuch as the Chief Engineer would be obliged to conform to the orders of the Master, who was the charterer's agent, the possession and control vested in the charterer; hence the instrument was a charter of demise. The word "control" is here used in a sense wider than that of mere administrative or navigational control, and must be understood to mean an absolute right to say how the vessel shall be employed during the whole course of the charter.

with the terms of the charterparty. The purchaser, however, with notice, is not bound himself to perform the stipulations embodied in a contract to which he was no party. (*Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108.) This last-named case concerned the purchase of a vessel with notice of a charterparty. The decision is of the Privy Council, and so is one which would be binding in India. In the Court of First Instance, [1925] P. 143, Hill, J., had followed "the more limited *dictum* of Lord Chelmsford in *De Mattos v. Gibson*" ([1858] 4 De G. & J. 276) to the effect that the mortgagee of a ship taking with full knowledge of a charter was bound to abstain from any act which would have the immediate effect of preventing its performance. This then was obviously the view of equity. In the same early case *Knight-Bruce, L.J.*, had made use of much wider language in a passage which has given rise to some difficulty. "Reason and justice," said he, "seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." In 1914 the last-mentioned passage from the judgment of *Knight-Bruce, L.J.*, was adversely criticized in *London County Council v. Allen*, [1914] 3 K.B. 642, Buckley, L.J., observing that in his opinion it was "not true as a general proposition that a purchaser of property with notice of a restrictive covenant affecting that property is bound by that covenant". But, indeed, so far at any rate as property which could be described as "goods" was concerned, it had been for long recognized—indeed so far back as the 3rd resolution in *Spencer's case* (1 Sm. L.C. 65) and in *Splidt v. Bowles*, [1808] 10 East 279—that a contract cannot be annexed to goods so as to follow the property in the goods at common law. And a most distinguished jurist had written "in general, contracts do not by the law of England run with goods."<sup>1</sup> In 1919 the Court of Appeal in England had again to consider the doctrine applied in *De Mattos v. Gibson*. Scrutton, L.J., after reviewing the authorities, pointed out (*Barker v. Stickney*, [1919] 1 K.B. 121, 131) that equity had only interfered with the user of purchased property where it was clear that the vendee had notice of the rights of another party. He considered, however, that after 1882, when Sir George Jessel was Master of the Rolls, the interference of Courts of equity with a purchaser's user of his acquired property upon such a ground as that a purchaser was held bound by covenants in some agreement to which he was not a party, became restricted so far as real property was concerned to negative covenants for the benefit of land "treating them as analogous to covenants running with the land which the Plaintiff could not enforce unless he had land for the benefit of which the covenants could enure" . . . . . "But" he went on "as to personal property it was found that the general rule of *Knight-Bruce, L.J.*, was quite impracticable, and *Taddy v. Sterious*, [1904] 1 Ch. 354, *McGruther v. Pücher*, [1904] 2 Ch. 356, and *Dunlop v. Selfridge*, [1915] A.C. 847, have settled the law that the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he was himself a party to the contract in which the stipulations were made". It may then be asked how this view of the law is to be reconciled with the decision of the Privy Council in the case of

<sup>1</sup> Blackburn, on *Sale*, p. 276.

*Lord Strathcona S.S. Co. v. Dominion Coal Co.* to which a brief reference has just been made? In the last-mentioned case their Lordships treated the facts as disclosing "not a mere case of notice of the existence of a covenant affecting the use of the property sold" but as constituting an "acceptance of their property expressly *sub conditione*". The true view of the matter would thus appear to be that if a ship be acquired under circumstances which make the contract of sale conditional upon non-interference with the rights of an existing charterer, equity will certainly interfere to prevent any breach of that condition by which the charterer's rights under his charterparty may be adversely affected.<sup>1</sup>

For the more common forms of charterparties the reader is referred to standard works on shipping. Certain trades have involved special forms to meet their particular needs.

**Bills of Lading.**—A person who is shipping goods—and who may not necessarily be the actual owner thereof—corresponds to the individual who, in the law relating to the carriage of goods by road or railway, is styled the "consignor". In contracts of affreightment he is styled the "shipper". In modern commercial practice a contract between a shipper of goods and the carrier of them (be the latter a shipowner or a mere charterer) is frequently effected through a broker; and whether through a broker or more directly between the parties, the contract may be effected verbally, with or without confirmation in writing. It is, however, an almost universal practice to ship merchandise under a document signed by the Master of the vessel which is to carry them. This is styled a "Bill of Lading".<sup>2</sup> It is usually made out in a "set" of 3 or 4. In contemplation of law a bill of lading, unlike a charterparty, is not a contract in writing, but is a *memorandum* of a contract already in existence. In form it is also a "receipt"; for it acknowledges the shipment of specified goods, and contains, as such a memorandum must, the essential terms and conditions upon which the parties are agreed that the goods are to be carried. Accordingly it is regarded as evidence of the nature and extent of the contract, and is treated as a document of title and one which, by the recognized custom of merchants, so operates by endorsement and delivery to another as to transfer to that other person the property in the goods.<sup>3</sup>

In practice goods are frequently delivered to a ship and taken on board prior to the execution of the bill of lading: a temporary document, known as the "Mate's Receipt", signed on behalf of the carrier by

<sup>1</sup> The following is the note upon this case which is to be found in the 19th Ed. of Chitty on Contracts (at p. 43). "This seems to distinguish the case from *De Mattos v. Gibson*. Apparently the acquirer of rights in a ship is regarded as a trustee in equity which a Court of equity will not allow him to violate, and it may well be that this is the distinction to be drawn between a ship and other chattels." We incline to the view that their Lordships did not mean to apply a doctrine of this character to a ship which they would not have applied to, say, a pianoforte; but that the ratio of the decisions in both the *De Mattos* and the *Strathcona* cases proceeds upon the degree to which the parties to the sale intended the contract of purchase to be affected by notice of the rights of user already created by the charterparty. It appears to us that the use of the words *sub conditione* in the Judgment of the Board in the last-mentioned case makes this plain.

<sup>2</sup> It is settled in India since the Stamp Act Reference decided by the Calcutta High Court in 1903, reported in 30 Cal. 565, that a document of this character covering goods to be carried over an inland waterway only is a bill of lading and must be stamped as such.

<sup>3</sup> See the Indian Bills of Lading Act (IX of 1856) based upon the English Statute of the previous year (18 & 19 Vict., c. 111).

the ship's officer on duty being given to the servant or agent of the shipper and afterwards exchanged for the bill of lading so soon as the latter shall have been signed by the Master. A document not in the usual form of a bill of lading, but acknowledging the receipt of goods as "for shipment", was considered by the Privy Council in *'Marlborough Hill' Ship v. Cowan & Sons*, [1921] 1 A.C. 444, and held to constitute a bill of lading.<sup>1</sup> Where the ship is under charter the relative bills of lading frequently make mention of the charterparty so as to attract the latter's terms. A bill of lading may be so drawn as to cover carriage of goods by sea "and/or" some other method of transport, and may involve a destination other than a port. Such a document is known as a "through bill of lading".<sup>2</sup> Ordinarily a carrier will not deliver to a consignee without production of one of the set of bills of lading covering the particular merchandise. But in certain cases he does so against an indemnity or a guarantee to produce a bill of lading.

**Liability of owners and charterers under bills of lading.**—The topic of a shipowner's or a charterer's liability to those who entrust their goods to him, will be dealt with more at large hereafter. It needs, however, to be stated that so far as merchants are concerned, the value of marine insurance lies in the degree to which insurers undertake to shoulder those risks which the owners and charterers of the world's shipping today have almost wholly contrived to avoid. The student has but to glance at the terms of the commoner forms of charterparties and of bills of lading now in use and, for example, at the provisions of the various Merchant Shipping Acts passed in Great Britain between 1894 and 1921, as also at those of the Carriage of Goods by Sea Act, 1924, to realize that, in the result, the obligations of the average shipowner or sea carrier have been reduced to little more than the agreeable duty of collecting the freight. The 30th conference at the Hague was followed in 1922 by the signing of a convention at Brussels defining, *inter alia*, the risks to be assumed by carriers under bills of lading. The convention led to various local statutes of which the Indian Carriage of Goods by Sea Act (XXVI of 1925) is an example. The material sections are printed as Appendix IV to this treatise. In *Cunard Steamship Co. v. Marten*, [1902] 2 K.B. 624 the charterparty contained no "negligence clause" whereby a modern shipowner used to escape his common law liability. Accordingly the owner felt obliged expressly to insure himself against that liability.

**Certain technical terms.**—The meaning of certain words and terms, more or less technical in character which are in common use in the shipping world today, and which constantly occur in the relative documents, including policies of marine insurance, will now be explained. They are set out in alphabetical order.

**Average.**—The origin of this word as used in the law relating to shipping is obscure. The final syllable of the word is the same as that appearing in words such as wastage, wharfage, demurrage, pilotage, etc., whilst the first half of the word which corresponds to the first syllable of

<sup>1</sup> Cf. *Nissim Isaac Bakhor v. Haji Sultanali Shastary & Co.*, [1916] 40 Bom. 11, where the documents tendered were held not to be bills of lading but mere receipts for warehousing or shipment.

<sup>2</sup> It will be seen hereafter that "through" carriage of goods in this manner may be subject-matter of a policy of Marine Insurance. But apt terms must be used.

the French "*avarie*" and of the Italian "*avaria*" derives, according to some French lexicographers, from an Arabic word "*avar*". It now, a-days connotes chargeable damage or loss. But, unfortunately, the word is not consistently used in the law of marine insurance. The more constant employment of the word "average" is in the distinction which the law relating to shipping draws between average (in the sense of chargeable loss or damage) of a "general" and that of a "particular" nature. But here, again, the student must understand the word "general", when used in opposition to "particular", as representing the fact that more than one person is in contemplation of law affected by the loss or damage. With this distinction in mind it will be easier for the student to appreciate the following definition of general and particular average. "A *general average* differs from a *particular average* in its nature and incidence. The former is a partial loss, voluntarily incurred for the common safety, and made good proportionately by all parties concerned in the adventure; the latter is a partial loss, fortuitously caused by a maritime peril, and which has to be borne by the party upon whom it falls."<sup>1</sup> In *Birkley v. Presgrave*, [1801] 1 East 220, 228, the ordinary significance of the expression "general average" is thus stated "All loss which arises in consequence of an extraordinary sacrifice made, or expense incurred, for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested". Hence such expressions as "general average loss", "general average sacrifice" and "general average contribution" all come within the notion of "general average".

It should be noted that the concept of a rateable liability which is sought to be expressed in the two words "general average" was evolved out of the custom of merchants, so that it became part and parcel of the recognizable law merchant which is, so far as England is concerned, to be regarded as merged in the Common Law. At Common Law, then, the obligation to contribute towards making good a general average loss, or to share in a general average expenditure, exists independently of any contract of marine insurance. In other words the obligation arises from the fact of participation in the marine adventure. Accordingly, when the proportionate adjustments have to be made, we find that in practice they are, where British law prevails in the matter, made in accordance with rules framed to provide for the obligations which arise at Common Law. In the *Brigella*, [1893] P. 189, 195, the doctrine is thus stated by Gorell-Barnes, J.: "The obligation to contribute to general average exists between the parties to the adventure whether they are insured or not. The circumstance of a party being insured can have no influence on the adjustment of general average, the rules of which are entirely independent of insurance. If a contracting party is insured he can claim an indemnity against his underwriter in respect of the contribution which he has been compelled to pay in general average, but that is all. I do not forget that in some cases an assured may have a right to recover in full for the loss of sacrificed property, but the underwriters have the right to contribution from the various contributories, and, subject to certain differences of values, the result to the underwriters should be practically the same as if the assured had only claimed his contribution from them."

<sup>1</sup> McArthur, 2nd Ed., p. 163. Thus the adjectives *general* and *particular*, when so used, are seen to refer not in fact to the substantive "average" (as meaning chargeable loss or damage) but the extent of the resultant liability.

*Average Adjusters.*—The working out of the proper proportions chargeable against parties to any particular adventure which has become involved in a general average loss or a general average expenditure, so as to conform to the relative mercantile rules applicable in the particular circumstances, now-a-days forms a profession in itself. Consequently the Average Adjuster is an individual to whom parties interested in a general average contribution must have recourse whenever the occasion arises.<sup>1</sup> Average adjusters are to be found in most of the chief ports of the world.<sup>2</sup> Often they are members of an association of average adjusters, and they work to a formulated set of rules<sup>3</sup> by which their clients must be content to abide.<sup>4</sup> Such rules are by no means uniform. In most continental countries the rules worked out naturally follow, and give expression to, those juristic ideas concerning maritime transactions which have become part of the statute law of the land, or which the competent courts have long accepted at the hands of recognized authorities. In most continental countries special tribunals exist for the trial of mercantile cases, including claims under marine insurance or under the special maritime law. In England and the United States there are no such special tribunals. In England and in those High Courts in India which have inherited the jurisdiction of the old Supreme Courts of the original three Presidencies such causes either fall within the Admiralty or Vice-Admiralty Jurisdiction or may be marked as "Commercial Causes". In the Presidency Towns the procedure in such causes follows to some extent that which obtains in the Commercial Court which is part of the King's Bench Division of the High Court in England.

The extent to which the merchandise of the world is now-a-days exchanged by the utilization of ships, regardless of the flag under which they sail, has led mercantile communities generally to agree that liabilities arising under the doctrine of "general average", shall be adjusted according to the rules prevailing at the port of destination. Naturally the commercial opinion of the world has tended more and more towards some form of standardization of such rules, and accordingly international conferences have from time to time met with that aim in view. And, indeed, tangible results in that direction have now been enjoyed for more than a decade by those who are content to import into their contracts the York-Antwerp Rules of 1924, which may be regarded as a more or less complete code covering the adjustment of general average contributions. It is usual today, therefore, to include in a marine policy, a "foreign adjustment clause" whereby either a particular foreign law or the law of the port of destination or the York-Antwerp rules are expressly attracted.

The topic of general average is dealt with in the present chapter in more detail hereafter. For the moment it will perhaps be sufficient to mark the fact that, according to English law and the custom of merchants, it is considered the duty of shipowners and their agents at home and abroad to take every reasonable step to insure that general average contributions, whether due to themselves or to others, are adjusted and collected. (*Crooks v. Allen*, [1879] 5 Q.B.D. 38; *Strang Steel & Co. v. Scott*, [1889] 14 A.C. 601, 607.) The shipowner enjoys a maritime

<sup>1</sup> *Waverlee S.S. v. Lorr*, [1897] A.C. 373, 380.

<sup>2</sup> There are none, as yet, in India, Burma or Ceylon.

<sup>3</sup> The British Adjusters' Association produces annual rules.

<sup>4</sup> *Carisbrook S.S. Co. v. London & Provincial Marine Insurance Company*, [1901] 6 Com. Cas. 291, 297; [1901] 2 K.B. 861.

lien on the cargo until the collection of these contributions has been effected.

As already observed particular average loss falls on the party, who, according to law, is required to bear it, and is not subject to contribution. The expression "average unless general" in a Lloyd's policy means any such partial loss of the subject-matter insured as is not a general average loss. Examples of damage, loss, or special charges classified under the respective doctrines of particular average loss or particular average charges will be found later in this chapter.

But the reader may come across the word "average" in the law relating to shipping contracts, used in a sense different from the connotation already explained when the epithets "general" or "particular" are prefixed to it. For example, extra charges are sometimes referred to as a customary or accustomed "average".<sup>1</sup> So, too, particular charges made in respect of pilotage or anchorage are sometimes referred to in commercial documents as "petty average".

*Barratry*.—This is another word which is considered to derive from the Arabic, where it connoted dishonesty in the nature of cheating. It comes to us through the Italian word *barrateria* and seems originally to have meant much the same as the old English word "cozening" which included every kind of deceit. Gradually the meaning has been extended more with reference to the methods whereby owners or charterers become injured or exposed to injury than to the particular motive behind the act. Numerous have been the modern definitions of barratry under the law of England, and considerable has been the commentary upon them.<sup>2</sup> Arnould's definition<sup>3</sup> of barratry with his note upon it is as follows: "Barratry, then, in English law may be said to comprehend not only every species of fraud and knavery covinously committed by the Master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or the charterers of the ship (in cases where the latter are considered owners *pro tempore*) are, in fact, damaged." And his note reads "The tersest and (perhaps) best definition of barratry is that given by Lord Hardwicke in *Leven v. Surasso* (Postlethwaite's Dict. 147, tit. Assurance), viz., that it is 'an act of wrong done by the Master against the ship and goods'." In *Mentz Decker & Co. v. Maritime Ins. Co.*, [1909] 15 Com. Cas. 17; [1910] 1 K.B. 132, Hamilton, J., referred to the authorities prior to the Marine Insurance Act, 1906, as showing "that when a Captain is engaged in doing that which, as an ordinary man of common sense, he must know to be a serious breach of his duties to his owners and is engaged in doing that for his own benefit, then he acts barratrously". But it may be asked whether *qua* the Master of a vessel, any definition is better than that which is to be found in the old case of *Phyn v. Royal Exchange*, [1798] 7 T.R. 505, 508: "Barratry must be some breach of trust in the Master, *ex maleficio*".

Barratry, however, is not confined to conduct so characterized in the case of the Master. The modern view of the matter is that barratry may be committed by the Master and crew or by the crew alone and the

<sup>1</sup> E.g., a familiar clause is "primage and average as accustomed". For a definition of "primage", see p. 112, *post*.

<sup>2</sup> The editors of the 4th Ed. of Chalmers' *Commentary on the English Marine Insurance Act, 1906*, p. 161, have collected nine definitions. Payne's *Carriage of Goods by Sea, 4th Ed.*, p. 7, offers yet another.

<sup>3</sup> 11th Ed., § 838.

latter may be guilty of such conduct against the Master and owner. This was decided so long ago as 1815 in *Hucks v. Thornton*, 17 R.R. 594.

Barratry being one of the perils commonly insured against, it has long been a matter of the first importance to know what conduct is within the accepted view of the law. It has been recently decided by a majority of the House of Lords (in *Samuel v. Dumas*, [1924] A.C. 431) that an innocent mortgagee cannot recover for a loss by barratry in respect of an act done by the Master or crew where there is the connivance of the shipowner, the ratio of the decision being that such a degree of collusion between Master and owner does not bring about a loss by "perils of the seas".

The following have been held to amount to barratry: sailing away without paying port dues, whereby ship and cargo became subject to forfeiture; disregarding an embargo, resulting in loss of seamen's wages and provisions; without knowledge or consent of the owners, intentionally breaking a blockade; illegal trading, whereby the ship is seized and condemned; shipping passengers with knowledge and in defiance of a Kidnapping Act; cruising contrary to the intention and instructions of the owner; smuggling, mutinously carrying the ship out of her course, or fraudulently running her ashore; in any way fraudulently procuring the ship to be condemned and sold; scuttling the ship;<sup>1</sup> fraudulent deviation; stopping the ship and landing for a private commercial purpose personal to the Master; wantonly acting contrary to pilot's directions and instructions, with consequent loss to the owners.<sup>2</sup>

On the other hand, conduct, however much the occasion of loss to the owners, if it proceeds from mere ignorance, incompetence or carelessness, can never be classed as barratrous.

The essence of barratry being fraud on the owners, it early became of importance to decide, by reference to the terms of the relative charterparty, whether an individual charterer was so positioned as that barratry could be committed against him and so was a peril against which he could insure. Where by the charterparty the owner covenants to do no more than carry the charterer's goods, the charterer is manifestly not an "owner" in any sense: the management and control of the Master and crew remaining vested in the true or "general" owner. So, too, where the charterer is by the particular instrument vested with the absolute dominion over the ship and appoints the Captain and the members of the crew, it is obvious that he is, at least temporarily, in the position of an owner by demise of the vessel; and consequently it is not surprising to find that in every such case the law is that barratry may be committed by the Master and crew against any charterer so positioned. Where, however, the terms of the charterparty reveal a letting of the ship in a condition in every sense fit for the purposes of the adventure complete with Master and crew, it may become a nice question whether such a charterer can be held to be sufficiently the owner for the Master and crew to be capable of barratrous conduct against him. It is consequently a question of fact in each case whether the control be sufficient on the part of the charterer to make him for all practical purposes an "owner" during the currency of the charterparty, so as to come within the decision of the leading case of *Vallejo v. Wheeler*, 1 Cowp. 124 (*sub nom. Wheeler v. Vallejo*); and *Lofft 645*; an 18th century case, in which the facts were as follows. The general

<sup>1</sup> For a definition of "scuttling", see p. 112, *post*.

<sup>2</sup> See the cases collected in Arnould, 11th Ed., §§ 842-848.

owner of the ship had chartered her to D, who put her up as a "general ship".<sup>1</sup> The plaintiff was one of several merchants who shipped goods in her during the currency of the charter. It appears, from the better of the two reports, that the Master and crew were hired and provisioned by the general owner and not by the charterer. Consequently the facts would appear to show that there was a hiring out of the vessel completely manned and provisioned as part of the contract. With the privity of the general owner, but without the knowledge of the charterer, the Master went out of his course and put into a port with the object of smuggling wine and spirits on a private enterprise of his own. Shortly afterwards the ship sprang a leak, put into another port for repairs, only later on to suffer further injuries, by which she was finally prevented from completing her proper voyage and the plaintiff's goods suffered damage in consequence. Lord Mansfield held that the charterer was owner for the voyage, and that the Master's conduct, though with the privity of the general owner, was yet an act of barratry against the temporary owner (the charterer) and consequently was an act for which the plaintiff, as an assured, might recover. The author proposes to make no comment upon the later case of *Soares v. Thornton*, [1817] 7 Taunt. 627, beyond observing that though the principle of Lord Mansfield's decision in the previously noted case was applied, the report seems to show that the control and management of the ship was not in fact in the charterers, but would appear to have remained in the general owner.

There has been some controversy as to whether a loss by barratry is recoverable unless the latter is the proximate cause of that loss. It is submitted as the better opinion that the loss must be in some sense referable to a prior act of barratry "although not necessarily in the way of immediate and direct effect".<sup>2</sup> Loss by barratry therefore forms in some sense an exception to the general rule that it is the proximate and not the remote cause which is to be regarded as affording a good ground of claim.

**Bottomry.**—As merchandise is usually shipped in the hold or "bottom" of a ship, such language as "shipping in British rather than foreign 'bottoms'" exemplifies the slang use of the word bottom to represent the entire vessel. Mention was made in the first chapter of this treatise of a very early form of assistance given to merchants as security for a loan whereby a ship and its contents were hypothecated to a banker on condition that nothing be repayable unless the vessel and her cargo should reach a given destination, or safely return, as the case might be; and that in consideration of a loan so made the borrower was content to pay a high rate of interest. Loans of such a character have been procurable ever since, and are known as loans on "bottomry", the instrument by which ship and cargo are given as security being styled a "bottomry bond".

A transaction, not dissimilar in its principal condition, is one by which the cargo only is hypothecated. The particular instrument for the last-named purpose is sometimes (though wrongly) also styled a bottomry bond. Its true and traditional designation is, however, a "*respondentia*" bond.

In both cases the money is not repayable unless, in the first instance, ship and cargo arrive, and, in the last unless the cargo safely reaches

<sup>1</sup> I.e., one in which any merchant might seek space for the carriage of his goods.

<sup>2</sup> Arnould, 11th Ed., § 858, as collected from the following decisions: *Vallejo v. Wheeler* (*supra*), *Colley v. Burr*, [1881] 8 Q.B.D. 313 and 9 Q.B.D. 463, and *Monte Decker & Co. v. Maritime Ins. Co., Ltd.* (*supra*).

port. A deed making the loan repayable "in any event" has been held not a good bottomry bond. (*Simmonds v. Hodgson*, [1835] 3 B. & Ad. 56; *The Haabet*, [1899] P. 295.)

As early as *Lucena v. Crauford*, [1806] 2 B. & P. N.S. 269, seven of the Judges giving their opinion in the House of Lords laid it down that "Inchoate rights founded on subsisting titles, unless prohibited by positive laws, are insurable. Freight, *respondentia*, and bottomry are of this description . . . . . These definitions<sup>1</sup> clearly embrace a contingent interest which is subject to the perils of the sea and for the loss of which a compensation may be made".

The importance of transactions of this kind to students of marine insurance law is that they create insurable interests in ship and cargo, which may be validly covered by marine policies. In an Indian case, *Jivanji Noorbhoy v. Coorji Laladhar & Ors.*, [1880] 4 Bom. 305, the Court had to determine whether an insurable interest was created where money had been lent in accordance with a local custom known as "avung". The material facts are thus stated in the judgment of Sergeant, J.: "A certain trade is carried on between native merchants in Western India with the coast of Africa and Madagascar by means of native vessels which leave the Indian ports early in the year, and after remaining in the ports of Africa and Madagascar for 4 or 5 months, leave on the return voyage about August or September. This trade consists in shipping goods at the Indian ports, to be disposed of at the African and Madagascan ports, and purchasing with the proceeds fresh goods to be similarly disposed of in the home ports. To enable traders to embark in this venture, it is their practice to borrow money of merchants on what is termed 'avung'; that is, money borrowed on the condition that it is not to be repaid except in case of the safe arrival of the goods in the home ports on the return voyage, in which event the loan becomes repayable with interest at a high rate". The Court held that the interest of the lender in the goods on board the vessel on her return voyage to India was an insurable interest.

A Bench of the High Court at Madras in *Vappakandu Marakayar & Another v. Annamalai Chelli & Another*, [1901] 25 Mad. 561, has maintained a contrary doctrine. The facts showed a lending of money under conditions wholly similar to those obtaining in the Bombay case above referred to. The lender tried to recover the loss he had sustained as a result of the ship itself becoming lost and his loan to the owners being, under the local usage, irreclaimable. The Court, whose attention was not drawn to the Bombay case, held the contract to be one of wager and as such void under the Contract Act. It is submitted that the decision of the Bombay High Court represents the correct view. The solution of the difficulty, as it seems to the author, lies in reconciling section 30, which makes contracts by way of wager void, with the provisions of section 1 of the same statute which expressly disclaims any intention of affecting any usage or custom of trade. The words in the last-mentioned section "not being inconsistent with the provisions of this Act" are not to be connected with the clause "nor any usage or custom of trade". Accordingly a usage or custom of trade properly established, though in its general character wagerous, will override the provisions of section 30.

*Bulk-heads*.—The vertical walls in the structure of a ship whereby she is divided into a number of separate compartments. Modern ships,

<sup>1</sup> I.e., various accepted definitions of insurance which their Lordships had enumerated.

in cases where, ordinarily, communication may run through the bulk-heads are provided with water-tight doors of sufficient strength to confine the flooding of a vessel to one or more of her compartments.

**Buoy.**—A word derived from the Latin *boia* meaning a fetter or shackle. In nautical language the word is pronounced as "boy". It describes an object sometimes spherical, but often of quite peculiar shape, which is so constructed as to be air-tight and water-tight. It consequently will remain afloat in all weathers. It is, however, permanently anchored, or otherwise attached to the bottom of the sea or bed of a river, as the case may be. Buoys are used to mark particular spots, or by their number and position to indicate the whereabouts and course of navigable channels. Modern ingenuity has enabled such buoys to be fitted with revolving or other lights so that they may be identified at night with reference to their position on the relative chart. Another and most important use of these contrivances is to mark positions in harbours where vessels may be safely moored in accordance with local regulations. Buoys designed to fulfil these latter functions are specially constructed so that vessels may be made fast to them. When a vessel is thus tied up to a buoy she is often said to be "shackled" to it, and the hooks and chains which are employed for that purpose are commonly known as "shackles".

**Days.**—The working time of a ship is continuous when at sea. What constitutes a working day when in port is subject to agreement modified by custom or local regulations. The student of shipping law, however, meets with the word "day" conjoined with the following epithets: "Lay Day", "Running Day", "Working Day" and finally "Weather Working Day". These expressions will now be explained.

"Lay Days" are counted from midnight to midnight. They run continuously and represent, according to the number agreed upon, the period allowed for loading and discharging cargo. Time begins to run for this purpose from the moment when the vessel "arrives" at the place agreed upon and notice of her arrival has been given to the parties interested, *e.g.*, in the case of a ship under charter, when notice of her arrival reaches the charterer. Sometimes nice questions of mixed law and fact arise as to the precise moment at which a particular vessel is an "arrived" ship within the meaning of the contract. Any shorter period counts as a whole "lay day" where a vessel has failed to discharge within the lay days allowed, unless the contract prescribes the rate of working in terms of "Weather Working Days" when, on the intervention of bad weather, periods of extra time beyond the ordinary Lay Days will not count as more than half-days each. Demurrage becomes payable on the expiration of the Lay Days.

A "Running Day" in strictness refers to every day of the year: it being assumed that, if not detained in a port for the purposes of the contract, the vessel will be free to be sailing the seas.

"Working Days" means days on which work is customarily done in connection with the loading or discharging of cargo at the relative port. Thus the customs (in the sense of "usages") of a port or the intervention of statutory holidays—so far as the same may legally affect work in the port—have often to be taken into consideration in determining the number of working days available under a contract of affreightment.

"Weather Working Days" are days on which climatic conditions permit the execution of the particular kind of work which is in question.

**Demurrage.**—Demurrage is a word which derives from the word "demur": familiar enough to students of the law in another form,

namely, "demurrer". In origin it comes from a Latin verb meaning "to delay". Hence the legal notion of a demurrer is its effect in checking the disposal of the merits of an action at law till some preliminary objection be ruled upon. In commercial law "demurrage" represents some agreed compensation to a carrier for detention of the whole or part of a vehicle in which goods have been carried. In a charterparty demurrage is the sum agreed upon as liquidated damages for a delay in giving over possession of the vessel.

*Deviation.*—This word literally means a turning from the chosen path or road; and connotes in the law relating to shipping a departure either from the course of the voyage which is stipulated in the contract or, where such a course is not specifically described, a departure from the customary course. In an early case it was held to be a deviation where a vessel proceeded to a place authorized by the Policy of Insurance but did so for a purpose unconnected with the voyage insured. (*Hammond v. Reid*, [1820] 4 B. & Ald. 72.) The principles of the law of deviation have been settled for more than a century in England: the leading cases for the propositions above stated being *Phyn v. Royal Exchange* (*ante*); *Tait v. Lery*, [1811] 14 East 481; *Davis v. Garrett*, [1830] 8 Bing. 716. The topic of Deviation will be dealt with more at large in a later part of this chapter.<sup>1</sup>

*Dunnage.*—Carriers by sea may be required to provide special material to keep particular classes of merchandise or particular packages apart from one another, so as to mitigate the risk of damage by contact. Special material is also required at the hands of the carrier in order to protect merchandise in the holds or as deck-cargo from the effects of sea-water. All such material when provided by the carrier is collectively known as "Dunnage".

*Embark.*—Bark is an old word meaning a ship. To "embark" is to go on board a ship. It is also used transitively as meaning to "put on board". The verb is, however, only used in connection with the taking on board of passengers and animals. "Disembark" is the word used to describe the reverse process.

*Fairway.*—That part of a river or of a channel in which ships can normally be manoeuvred in safety.

*Inherent vice.*—Inherent vice means some characteristic inherent in (in the sense of being natural to) the thing which is the subject-matter of carriage by sea, and which characteristic causes it, in the course of such carriage, to deteriorate or to become dangerous, without any negligence or wrong-doing on the part of any one as a contributory cause. A flaw or fault of which no one may be conscious at the time of shipment, may be within the definition. So, too, a faulty condition of packing may be included, so long as the same be a characteristic of the material used, even although only certain conditions obtaining on the voyage may reveal the particular characteristic.

*Jettison.*—This verb means to "throw over" but in shipping parlance it is used of casting overboard any part of the ship's tackle or cargo. The word comes to us from the French "*jeter*" to throw. Jettison may properly be resorted to for the purpose of lightening the ship or otherwise mitigating some dangerous condition in which she is placed.

*Jetty.*—This is the name given to a permanent or semi-permanent structure "thrown out" from a shore or from a containing wall of a harbour, etc., as a means of giving access to vessels. In many ports there

<sup>1</sup> See pp. 152, 172-175, *post*.

is a continuous line of such structures. The modern usage of the word and of such other words as mole, pier or wharf has tended to obliterate the original distinctions between structures having the more or less similar aim of enabling vessels to be brought alongside them so as to embark or disembark passengers or to load or discharge cargo.

*Out-turn.*—Is an expression used of merchandise in the condition in which the sea-carrier delivers it at destination.

*Pilferage.*—Denotes petty thieving.

*Pilotage.*—Is a word used in two senses: sometimes of the act of guiding a vessel under circumstances of difficulty (of which mention has already been made in this chapter, in connection with recognized Pilot services) and sometimes of the allowable charges for the performance of the duties undertaken.

*Primage.*—Refers to a commission sometimes payable to shipping brokers. It is calculated in terms of a percentage on freight.

*Quarantine.*—This word refers to and describes the period during which persons who may be suspected of having become infected with some contagious disease are forbidden to land from an infected ship, and persons from the shore are forbidden to go on board her. Originally the period was forty days; hence the form of the word. A ship on entering port, when her Master is aware of a contagious case on board, is required to fly a distinctive flag. She will then be brought to anchor or moored under the particular regulations of the port at a suitable distance from the shore, and will so remain and continue to fly the same flag till the period of quarantine be over.

*Quarter.*—Means the after-part of the ship's side between the main mast (if there are but two masts) or the mizzen—being the rearmost in a three- or four-masted vessel—and the stern. In describing an object at sea or ashore as seen from a vessel, where the landmen might use such a phrase as "to the right front" or "to the left rear", as the case might be, the seamen would describe it as "over the starboard bow" or "over the port quarter".

*Quay.*—This is a name given to an artificial landing place. It is frequently used of a dockside where passenger and goods traffic may be dealt with.

*Salvage.*—Salvage is used in two senses: sometimes of the act of salvaging or "saving" a vessel or its cargo from destruction, and sometimes of the remuneration paid for such a service.

*Scuttle.*—This is a word with more than one meaning. As a noun it means any rectangular hole or opening, either in the deck of a ship or in its side, designed to give access from one deck to another or to afford light or ventilation. In the former instance it is something smaller than a "hatchway", and less than a window in the other instance. In the British Navy it is used also of the circular windows in cabins which in the merchant service are usually named "port-holes".

From the fact that the noun connotes, in any case, an "opening" of some sort, has been created a verb "to scuttle", connoting the act of making a hole below the water-line. This verb, in the law relating to shipping, is exclusively used of such an act when made with the deliberate intention of sinking or otherwise bringing the vessel to disaster. The opening of sea-cocks (which are contrivances designed to flood the vessel or some part of it for a legitimate purpose), if done with a criminal intent, would amount to scuttling.

*Tackle.*—This is a noun comprehending a great many things in relation to a ship, and consequently is an important word for students

of maritime law. It comprehends and includes apparatus of all kinds (other than machinery, properly so-called) in aid of the ship's progress at sea, of her security when in harbour, and of what is expected of her in the matter of loading and discharging cargo. Such apparatus may, in the first place, be roughly classified as "running" or "deck-tackle", and "ground-tackle". The latter includes the ship's anchors, anchor chains and any apparatus in the nature of running gear such as pulleys, ropes and the like, used for bringing the anchor in-board when "weighing". So, too, the shackling gear for making fast to a buoy is "tackle". All running gear such as is required for hoisting or lowering masts, spars, sails, signal or other flags, and for lowering or raising life-boats, gangways, as also for hoisting in or out cargo at a wharf side or into or out of lighters, comes within the definition of "tackle". Deficiency in, or defective, tackle requisite in a ship amounts to "unseaworthiness" in the vessel.

**Tonnage.**—This is a word used in several senses in relation to shipping. When used as descriptive of a vessel's carrying capacity it represents an expression in tons based upon a hundred cubic feet per ton. In reference to the size of the vessel it is used of what is styled her *displacement*, where "tonnage" represents the weight of water displaced by a ship when loaded to her legitimate capacity. Gross tonnage is the calculation of the cubic contents of the space under the top deck *plus* the contents of all enclosed spaces above it. By deducting from the aforesaid gross tonnage all that is taken up by the officers' and crew's quarters and all space occupied by engines and boilers, etc., a figure is arrived at which represents the net tonnage. It is upon the latter "tonnage" that particular dues and charges in respect of vessels are usually assessed.

The word is also used of the charge made for the hire of a ship when the same is calculated at so much a ton of her burthen (capacity).

**Towage.**—Another word used in two senses in the law relating to shipping. It may mean the act of pulling a ship by means of a force exercised for the purpose by another vessel or vessels: or it may refer to a charge made for the rendering of such a service. The law of "Tug and Tow" is a special branch of maritime law.

**Tug.**—This is the name given to a vessel specially designed for towage. Such craft are usually of relatively small tonnage and specially engined to develop the highest possible tractive power allowable by their dimensions.

**Ullage.**—Refers, in the language of shipping, to liquid cargo of any kind, and represents any shortage therein which is discoverable in the containers employed.

**Wharfage.**—Is a word also used in more than one sense in the law relating to shipping. It may mean, according to the context, either the provision of, or accommodation at, a wharf, i.e., at a structure (sometimes referred to as a pier or jetty) so built that ships may lie alongside it; or the word may refer to the charge or dues exacted for such accommodation. It may also refer to such charges for the accommodation of merchandise either on discharge from a ship or prior to loading.

### 3. Nature of Marine Insurance.

**Definition of Contract.**—We think it not unreasonable to assume that as a working definition of a contract of marine insurance the Courts in India will accept and for practical purposes adopt the definition which commended itself to the draughtsmen of the Marine Insurance Act, 1906

(6 Edw. VII, c. 41), since that definition represents in synthetic form the effect of all the authorities which the framers of the Act had before them. The definition itself is contained in section 1 of that statute and is in the following terms:—

“A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say losses incident to marine adventure.”

The cardinal feature of a contract of marine insurance is that it falls within the category of an indemnity. The respective rights which belong to those who are parties to such a contract have already been explained in Chapter III of this treatise.<sup>1</sup> Theoretically those rights, together with rights to be enjoyed by persons claiming under the original parties in virtue of the doctrine of subrogation, are to be enjoyed to the full by, and it may be conceded, too, that in practice they are, in general, enjoyed by, all rightful claimants to them. Yet it has often been pointed out, and with reason, that it may not always turn out to be a perfect contract of indemnity. (*Lohre v. Aitchison*, [1877] 2 Q.B.D. 501, and on appeal *sub nom. Aitchison v. Lohre*, [1879] 4 A.C. 755, 761; *British and Foreign Marine Ins. Co. v. Wilson Shipping Co.*, [1921] 1 A.C. 188, 214; *Goole and Hull Steam Towing Co. v. Ocean Marine Insurance Co.*, [1928] 1 K.B. 589, 594.) From a study of the facts in cases where the ideal indemnity is not found to have worked out, it seems evident that such events as the assured getting sometimes rather less and at other times rather more than a perfect indemnity would give him, is referable ultimately to the terms of the particular contract into which the parties have chosen to enter. In other words the result of a logical working out of the terms of a contract into a particular money payment is to show that one or other of the parties has waived something to which the law would otherwise have entitled him. In short, if pure indemnity be not reached it is the contract rather than the law which is found to be at fault.

Naturally, if a contract of marine insurance is one of indemnity, not only original but re-insurance will have that character. There is, indeed, direct authority to that effect. (*British Dominions Insurance Co. v. Duder*, [1915] 2 K.B. 394 C.A.)

From another source, namely, from the Indian Stamp Act,<sup>2</sup> we have a legislative provision, definitive in character, concerning the nature of a contract for “sea-insurance” so far as the same is effected for the purpose of covering property on board a ship. The relative provision is in the following terms:—“Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise or property from any risk, loss or damage, such agreement or engagement shall be deemed to be a contract for sea-insurance.” It may be observed in passing and in connection with the foregoing provision that by the General Clauses Act<sup>3</sup> we are to understand the word “ship” as including “every description of vessel used in navigation not exclusively propelled

<sup>1</sup> See pp. 50 *et seq.*, *ante*.

<sup>2</sup> Act II of 1899, sec. 2 (2), (20) (b), para. 2.

<sup>3</sup> Act X of 1897, sec. 3 (51), (56).

by oars"; and the word "vessel" as including "any ship or boat or any other description of vessel used in navigation".

In India, as in England, that branch of legislation which is peculiarly concerned with revenue-making, namely, the respective Stamp Acts, have had a remarkably restrictive effect upon the degree to which contracts of sea-insurance may be availed of. In order to understand the language of those provisions of the Indian Stamp Act which have the effect alluded to, the reader must make some acquaintance with the ordinary methods of classifying the relative instruments.

**Classification of Policies.**—In the first place policies of marine insurance are broadly classed as "Valued" and "Unvalued" (or "Open").

A *valued* policy is one in which on the face thereof is expressed the agreed value of the subject-matter of the insurance.

An *unvalued* or "open" policy is one in which no value is so stated, but is left to be subsequently assessed, if and when loss or damage should occur. The expression "open" policy as descriptive of this class was, till yesterday, almost universally used. The more accurate epithet, however, is "unvalued", and is that which has commended itself to the framers of the English Code.

Other classifications which may be mentioned are "Voyage" policies, "Time" policies, "Mixed" policies, "Named" policies, and "Floating" policies. Some insurers speak also of "Cargo" policies. These will now be described.

A *voyage* policy is so called from the fact that the instrument specifies the limits of the voyage from the place of departure to that of destination. The place from which the voyage begins is often referred to in the courts as the *terminus a quo*, while the destination is known as the *terminus ad quem*.

A *time* policy is so called because the risk runs from one date specified in the instrument to another date also specified therein, or gives the period during which the risk subsists in general terms, e.g., "for six months".

A *mixed* policy is one in which the limits of the adventure are defined in terms both of place and time.

Where policies thus include the elements both of voyage and time policies, they are, for purposes of determining when the risk expires, treated as time policies. Accordingly the risk will expire when the time mentioned has run its course, irrespective of the geographical position of the ship in relation to the voyage named.

The difficulty which may, in this manner, obviously occur is met by the provision of what is described as a "continuation clause". In a common form of such a clause will be found apt words providing that in the event of the ship being at sea, or in the event of the voyage remaining otherwise incomplete at the expiration of the period of time mentioned in the instrument, the subject-matter of insurance shall be held covered until the ship's arrival, or for not more than thirty days thereafter.

A *named* policy is so called because the instrument expressly covers a marine adventure limited to the ship named therein.

A *cargo* policy is, as its name implies, one in which the subject-matter of insurance is limited to the cargo.

Naturally a particular policy may exhibit the elements of a voyage, a time, a named policy and a cargo policy.

A *floating* policy, strictly speaking, is one which does not condescend to name a particular ship, e.g., where goods on "ship or ships"

are insured for the same voyage. The English Code defines a floating policy as one "which describes the insurance in general terms, and leaves either the name of the ship or ships or other particulars to be defined by subsequent declaration". The definition given above conforms to the older authorities: the later and wider definition embodies the practice of modern merchants and is one which it is submitted the courts in India are, therefore, likely to accept and apply. Now-a-days policies are often so described when they cover goods to be shipped upon a named vessel within a period of time specified in the policy, but where the relative dates are left for subsequent declaration by the assured. Although in the language of commerce such policies are frequently spoken of as "floating policies" the law regards them as creating a number of separate insurances covering a series of voyages (*Johnson & Co., Ltd. v. Briant*, [1896] 1 Com. Cas. 363). The effect of various forms of floating policies will be discussed in more detail hereafter.

**Other documents evidencing the contract.**—Having thus briefly described for the purpose mentioned the accepted method of classifying marine policies it now becomes necessary to refer to certain other documents which in the ordinary way come into existence before the relative policy is, or can be, issued. Inasmuch as without some knowledge of the nature and purpose of these other documents, the reader might have some difficulty in appreciating the effect of the provisions of the Indian Stamp Act to which reference has already been made, this matter is discussed out of what would otherwise be its natural order.

**The Memorandum or Slip and the Cover-Note.**—India affords no exception to the general practice, whereby marine insurance is effected through middle-men who, in the current language of commerce, are styled "brokers".<sup>1</sup> By the custom of merchants such brokers are regarded as agents of the assured and not of the insurers. Sometimes such brokers take upon themselves to warrant or guarantee the solvency of the insurers. When they place themselves in this position they are to be regarded (but for the purposes of the contract of guarantee only) as *del credere*<sup>2</sup> agents, and thus become entitled to a commission *del credere*: the commission so payable is in respect of the contract of guarantee and is not brokerage in respect of the contract of marine insurance. It is customary to refer to those who are prepared to insure maritime risks as "underwriters" from the fact—already alluded to much earlier in this treatise—that such insurers subscribe, that is sign their names *at the foot* of, the policy, at the same time indicating, by writing plainly opposite their respective signatures, the amount for which the particular underwriter is content to be held liable.

As already observed, however, before any such policy can be underwritten and issued, the terms of the contract must have been already arranged by the broker. In the ordinary way he it is who brings the business to the underwriters. He usually does so by briefly indicating the nature of the interest for which insurance cover is required and he

<sup>1</sup> What is here stated of the position of the broker is true for policies effected in London. For Indian commercial usages and their legal consequences, see p. 213, *post*.

<sup>2</sup> The student will remember that in the law relating to sale of goods an agent for sale when acting *del credere* becomes responsible to his principal (the seller) for the solvency of the buyer. In short he guarantees the payment of the price when the same is ascertained and has become due. He does not assume any converse responsibility to the buyer for performance of the contract on the part of the seller. It is upon this analogy that he is regarded as acting *del credere* in marine insurance.

obtains from the underwriters the best terms he can. An experienced broker, naturally, will very likely be able to do a good deal on the telephone. Anyhow, in that or in some other manner, he is able to obtain a concrete proposition, which he then briefly sets out in a document commonly styled the "slip" or "label". In modern marine insurance we often hear of the "short slip" and the "long slip". It is, however, with the short slip that we are at the moment concerned. It is prepared by the broker for the signature or initials of the underwriter or underwriters or of their duly authorised local agents. It may be and often is in some such terms as the following:—

No. —————

A. B. & Co.

12 months.

Noon, ——— March, 19——.

Ship	..	..	..	£60,000
Machinery	..	..	..	£12,000
				<hr/>
				£72,000

*Institute Warranties and Clauses.*<sup>1</sup>

£6.

£5,000 X.Y.—1/3.

£3,000 T.Z.—1/3.

*etc.*

The above represents a common form of slip such as is customary for a marine insurance at Lloyd's in London. The risk will run from the date shown at the head of the slip and from the hour (if named), unless the policy finally issued in any way varies that time. The insurance will be good for 12 months to the extent shown. The premium is expressed in a form which will be understood as 6 per cent. The extent of each underwriter's liability is shown below duly initialled and dated by each underwriter himself. The reference to "Institute warranties and clauses"<sup>1</sup> is a guide to him who will from this slip make out the policy proper. A discussion and explanation of these warranties and clauses will be found in a later part of this chapter. For the moment it will suffice to say that upon this slip being initialled by those who are prepared to assume liability for the insurance, the policy would be drawn in the traditional form for a Lloyd's policy, but there would be incorporated in it a number of exceptions (styled "warranties") from specified circumstances and a number of other clauses falling within the category of institute clauses, all of which being thus incorporated in the policy, would become part of the contract.

The broker usually retains the original slip, but leaves a copy of it with the underwriters, upon whom then devolves the duty of preparing the policy itself.<sup>2</sup> In practice the rough notes—for that is all they are—which the slip contains as representing the terms to be embodied in the policy, are sufficiently precise in character to enable the policy to be correctly made out in all essentials. The policy when issued must,

<sup>1</sup> By Institute is meant the Institute of London Underwriters.

<sup>2</sup> In the case of Lloyd's policies, the broker also prepares the instrument. Other marine insurance concerns prepare their own policies. Indian usage (as to which, see p. 213, *post*) is otherwise.

indeed, conform to the contract which the slip evidences. For this reason the slip is often referred to as the "memorandum".<sup>1</sup> In *Ionides v. Pacific Fire and Marine Insurance Co.*, [1871] 6 Q.B. 674, Blackburn, J., thus described the place of the slip in marine insurance as understood in the commercial world of that day: "The slip," said he, "is in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business." To the like effect is a passage from the judgment in *Morrison v. Universal Marine Ins. Co.*, [1873] L.R. 8 Ex. 40, 190, "In effecting marine insurance the matter is considered merely as negotiation till the slip is initialled, but when that is done the contract is considered to be concluded." The Court in that case treated as proved, and as the strongest possible evidence of the fact that commercial men considered themselves bound by the terms of the slip, the usage of underwriters in issuing a sufficient instrument—namely, a properly stamped policy—in accordance with the slip, notwithstanding anything that might have happened after the same had been initialled.

It is a common practice for the broker to fill up a form of his own in rather more detail and to leave this with the underwriters in further aid of preparing the policy. This form is sometimes referred to as the "long slip".<sup>2</sup>

Mention has now to be made of the expression "cover-note" or "covering note". This expression is, in marine insurance, sometimes used of the short or of the long slip. But, in insurance generally, the expression has reference to a document which is intended more for the assured than for the broker, and is designed to provide insurance of an *ad interim* character, i.e., as indicating an assumption of the risk during the period of time between the initialling of the slip and the issue of the policy.

The following is a modern specimen of a typical "cover-note" as issued for a contract of marine insurance in British India by an old established undertaking in India. It is printed, and takes the form of a letter from the underwriters to the assured. When filled up all the essentials of the contract are incorporated. It is detachable from a book, so as to leave a counterfoil.

The reader will observe some three special clauses and two specified warranties with one alternative warranty. Though styled a clause on the face of the document, the expression "clause 1" must be understood to refer to the first of the numbered warranties. Upon the back of the document are printed the bounds of the port of Calcutta. This is inserted for the better working of the cover given to transit from shore to ship by lighter or country craft which is only intended to apply within the limits of the port.

<sup>1</sup> The reader must not confuse this use of the word "memorandum" with another use of the same word (to which his attention will be drawn later in this chapter) where it is used as descriptive of a particular part of a policy of insurance as drawn in the traditional English form, and particularly where that form is modelled on the ordinary Lloyd's policy.

<sup>2</sup> In *Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67, there was disconformity between the short and the long slip. The terms of the long slip were held the true evidence of the nature of the contract and the policy having been drawn in conformity with the long slip, rectification was refused.

No.....

Calcutta,.....193 .

TRITON INSURANCE COMPANY, LIMITED.

To

.....  
.....

Dear Sirs,

As desired, we hereby hold you covered on the usual conditions of this Company's Policy, to be issued hereafter, to the extent of. ....

on.....per.....

from.....

to.....

Rate.....discount.....warranted.....

Yours faithfully,

Shipments to be made through the Jetties or Kidderpore Docks or in cargo boats and Policy to be applied for before sailing of the vessel to which the interest covered hereunder attaches, failing which this cover note shall be null and void. When in cargo boats, the risk is to commence from time of their arrival within the limits of the Port of Calcutta as defined on the back hereof.

In the event of any claim for loss or average before Policies are applied for, this cover is to rank ratably for its proportion of the full amount eventually declared by the Insured to this and other offices by the vessel and such claim to be adjusted on the basis of invoice cost plus all charges and 10 per cent.

Cargo shut-out ceases to be insured hereunder unless by previous arrangement in which case all such cargo must be specially declared upon receipt of advices that it is shut-out.

1. Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

2. Warranted free of loss or damage caused by strikers, locked out workmen or persons taking part in labour disturbances or riots or civil commotions.

(Should Clause No. 1 be deleted, Clause No. 3 is to operate as part of the policy.)

3. Warranted free of any claim based upon loss of, or frustration of, the insured voyage, or adventure, caused by arrests, restraints, or detainments of Kings, Princes, or Peoples.

The following is a specimen of a common form of "cover-note" of the type known as an "open cover" for the insurance of merchandise subsequently to be specified in the form of a declaration. A suitable condition

to the latter effect is printed in the forefront of all the printed stipulations to be found at the foot of the document.

### TRITON INSURANCE COMPANY, LIMITED.

No. S/..... Calcutta,.....193 .

To.....

Dear Sirs,

As desired, we hereby hold you covered on the usual conditions of this Company's Policy, to be issued hereafter to the extent of Rupees.....

Rate..... Warranted.....

This cover expires on.....193 .

Yours faithfully,

*Each and every shipment to be declared hereunder.*

(There follow the same clauses and the same numbered warranties as are printed on the first of the cover-notes shown above.)

An "open" cover and a "floating policy" are alike in this, that neither document can create a firm contract in a final form until, by declaring the ship or the merchandise or such other particulars as may be essential, there is a clear identification of the venture to which the risk is to attach.

So far back as *Cory v. Patton*, [1872] 7 Q.B. 304, and *Lishman v. Northern Maritime Insurance Co.*, [1873] 8 C.P. 216 and 10 C.P. 179, the recognition by the Courts of the fact that, among merchants, the initialling of the slip was treated as concluding the contract, led to the doctrine that after the slip had been so initialled the assured was not bound to communicate to the underwriters any fresh fact which might come to his knowledge, however material it might be.<sup>1</sup> A Court in India refused to regard this doctrine as applicable to a case where an open cover or slip was given to a merchant who, later on, declared a ship and a cargo, well-knowing that in the meantime part of the goods he proposed thus to ship had already been lost in a boat going out to her. The assured did not communicate this fact to the underwriters, but, subsequent to the actual loss of part of the cargo, paid the agreed premium and obtained a policy in terms of the slip and of his declaration. (*Kasam Haji Mitha v. British & Foreign Marine Ins. Co.*, [1899] 23 Bom. 737.) The ratio of this

<sup>1</sup> The Courts, in spite of the difficulties raised by the Stamp Acts (as to which see the discussion on p. 121, post), regarded the contract embodied in the stamped policy, when issued, as relating back to the date of the slip. Thus the doctrine above alluded to was at least logical.

decision was that the loss of the cargo upon which the claim was made had taken place before there had been such an identification of the venture as was essential to a concluded contract.

The policy when issued is handed to or sent to the broker. The broker has, what is styled, a maritime lien on such a document and consequently may retain it until the premiums have been paid. By the more usual course of business, in the case of Cargo policies, the policy is made over to the assured when, of course, it may find its way to Bankers or others, so that the shipping documents relating to particular merchandise may be complete. Especially is this necessary when advances are to be sought. In the case of a policy on ship, however, the broker usually himself retains the instrument.

**Effect of the Indian Stamp Act.**—The attention of the reader will now be drawn to certain other provisions of the Indian Stamp Act, whereafter the effect of those provisions upon the law relating to contracts of sea-insurance will be discussed.

By section 2 (19) a "policy of insurance" includes "any instrument by which one person in consideration of a premium engages to indemnify another against loss, damage or liability arising from an unknown or contingent event."

An "instrument", by section 2 (14) of the same Act, includes "every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded."<sup>1</sup>

The next pertinent provision of the Indian Stamp Act is that which defines a "policy of sea-insurance" or "sea-policy" in these words, namely, as meaning. (a) "any insurance made upon any ship or vessel (whether for marine or inland navigation), or upon the machinery, tackle or furniture of any ship or vessel, or upon any goods, merchandise or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in, or relating to, any ship or vessel," and as including (b) "any insurance of goods, merchandise or property for any transit which includes, not only a sea risk within the meaning of clause (a), but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance."<sup>2</sup>

We now turn to the provisions of section 7 of the same Act which will be seen to be at once prohibitory and declaratory in character. The section reads as follows—

- "7 (1) No contract for sea-insurance (other than such insurance as is referred to in section 506 of the Merchant Shipping Act, 1894), shall be valid unless the same is expressed in a sea-policy.
- (2) No sea-policy made for time shall be made for any time exceeding twelve months.
- (3) No sea-policy shall be valid unless it specifies the particular risk or adventure, or the time, for which it is made, the names of the subscribers or underwriters, and the amount or amounts insured.
- (4) Where any sea-insurance is made for or upon a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her

<sup>1</sup> This definition is borrowed from the English Stamp Act of 1891.

<sup>2</sup> Sec. 2 (20).

destination and been there moored at anchor, the policy shall be charged with duty as a policy for or upon a voyage, and also with duty as a policy for time."

The first three of the foregoing sub-sections correspond with section 93 of the English Stamp Act of 1891. The fourth sub-section reproduces section 90 of the same statute. The words of section 506 of the Merchant Shipping Act, 1894<sup>1</sup>, which are thus attracted, are as follows: "An insurance effected against the happening, without the owner's actual fault or privity, of any or all of the events in respect of which the liability of owners is limited under this part of the Act, shall not be invalid by reason of the nature of risk." The sections which have reference to the limitation of an owner's liability are sections 502, 503 and 508 of the same statute. The effect of this provision of the Merchant Shipping Act is that an owner becomes by statute expressly authorized to insure even where his liability is by the same statute reduced to very little. These provisions, when read with section 7 (1) of the Indian Stamp Act, mean that such insurances, when effected by virtue of the Merchant Shipping Act, are not within the declaration as to invalidity which the Stamp Act has enacted. In short, in such cases, the slip or cover-note would be binding in law as much as in honour in India, and, consequently, will be outside the controversies which have arisen in England in connection with the corresponding provisions of the English Stamp Act of 1891 and which have recently been imported into India by reason of a decision of their Lordships of the Judicial Committee to which reference will shortly be made in this chapter.

In order to appreciate the controversy alluded to, so far as the law of India is concerned, it is necessary for the reader to become acquainted with the general exemption with which article 47 of the Indian Stamp Act concludes. After setting forth in that article certain specific exemptions, we find the article concluding as follows, and below the caption shown:—

*"General Exemption.*

"Letter of cover or engagement to issue a policy of insurance: Provided that, unless such letter or engagement bears the stamps prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned."

Having thus laid bare the relative provisions of the Indian Stamp Act, it will now be possible to enter upon a discussion of their effect. Apart from these provisions, there could be no question but that the slip or cover-note would constitute an enforceable contract of some kind in India, whether a formal policy of insurance subsequently issued or not. In the first place, it is manifestly, and indeed admittedly, a binding contract under the law merchant. It has been a contract under that law at any rate since 1871. The passages from *Ionides v. Pacific Fire & Marine Insurance Co.* and *Morrison v. Universal Marine Insurance Co.*, cited earlier in this chapter, established as much.<sup>2</sup> These contracts effected by the slip or cover-note are, moreover, clearly valid under the Indian Contract Act. But the question for discussion is whether or not

<sup>1</sup> 57 & 58 Vict., c. 60.

<sup>2</sup> In this last-mentioned case, however, the Court of Exchequer Chamber refused to go so far as to admit as good law a custom to the effect that a policy was, in such cases, bound to be issued.

their validity either under the law merchant or under the Indian Contract Act is not completely destroyed by the provisions of the Indian Stamp Act set forth above. Before, however, examining the Indian authorities it may, perhaps, be of advantage to notice the authorities in England, to gather the opinions of English jurists upon the position which the English authorities would seem to have created, and the method suggested for avoiding the commercial difficulties which that position is seen to involve.

One element of those difficulties, at one time very much to the fore in England, is happily confined to that country, namely, the extremely limited extent to which the slip or cover-note can be used in evidence. The slip or cover-note could not be stamped, and because it was not a policy of marine insurance, could not be put in evidence. The courts, however, have now got round the difficulty to some extent, and the position today is, under the English Code, that "for the purpose of showing when the contract was concluded reference may be made to the slip or covering note or other customary memorandum of a contract, although it be unstamped."<sup>1</sup> So far back as 1828 (in *Patterson v. Mills*, 1 Dow. N.S. 342) Lord Denman had given some ground for suggesting that a memorandum embodying an agreement to execute a proper policy would, if accompanied by payment of the premium, constitute a contract enforceable in equity, and in *Albion Life and Fire Insurance Co. v. Mills*, [1828] (3 Wils. & Shaw 218) the House of Lords on appeal from Scotland recognized the validity of an agreement in writing to execute a policy of insurance. Sir Joseph Arnould in 1857 gave it as his opinion that such a memorandum expressive of an agreement to execute a regular stamped policy could be enforced in a court of equity.<sup>2</sup>

In *Fisher v. Liverpool Marine Insurance Co.*, [1874] 9 Q.B. 418, the facts were that the London agent of an insurance company initialled a slip and received a copy of it which he forwarded to his principals to enable them to prepare the policy. The premium was duly paid, as was also the requisite stamp duty. No policy having been executed by the defendant company, the plaintiff brought an action for damages. In the Court of first instance Blackburn, J., decided that the defendants by accepting the copy of the slip must be taken to have agreed to use due diligence either to execute a stamped policy or to repudiate the transaction. On appeal to the Exchequer Chamber that court held that though the initialling of the slip and the forwarding of the copy were parts of one and the same contract, the contract itself as one of insurance could not be enforced by reason of the provisions of the Customs and Inland Revenue Act. In *Thompson v. Adams*, [1889] 23 Q.B.D. 361, Mathew, J., held a slip initialled by a Lloyd's underwriter to be a valid contract of insurance. But that slip was in respect of an insurance against fire, and the learned Judge held that the prohibitory clauses of the Stamp Act did not apply. Nine years later the same Judge in *Home Marine Insurance Co. v. Smith*, [1898] 1 Q.B. 829, held that the document in question, styled a covering note and initialled by the underwriters, was a "slip" and that a slip was not a policy of sea-insurance and therefore could not be stamped. The Court of Appeal<sup>3</sup> construed the covering note as a contract for sea-insurance within the meaning of the Stamp

<sup>1</sup> Sec. 21; and see sec. 89.

<sup>2</sup> In the 2nd Ed. of his treatise on the Law of Marine Insurance and Average, p. 52.

<sup>3</sup> [1899] 2 Q.B. 351.

Act, 1891. They refused, however, to regard it as a policy of sea-insurance, because it did not specify the sum or sums insured. In *Empress Ass. Corp. v. Bowring*, [1906] 11 Com. Cas. 107, Kennedy, J., held that an "open" cover slip was not a policy of sea-insurance.

The trend of the English authorities led the late Rt. Hon'ble Arthur Cohen, in the Law Quarterly Review for January 1914, to express the opinion that a slip is only an honorary agreement as to the terms of the policy which is subsequently to be delivered. The same learned person was largely responsible for the article on Marine insurance in the original edition of Halsbury's Laws of England, where it was stated that an initialled slip constituted an implied agreement to issue a policy in accordance therewith: but that if such a slip were initialled in England the agreement, though binding in honour, would be unenforceable in law owing to the provisions of the Stamp Act, 1891. This view is perpetuated by the editors of the Hailsham edition.<sup>1</sup>

The editors of the 11th Edition of Arnould take a somewhat different view of the present position in England.<sup>2</sup> They point out firstly that as the expression "policy of insurance" included, for the purposes of the Stamp Act, "every writing whereby a contract of insurance is made or agreed to be made or is evidenced", the slip in a marine policy would *prima facie* appear to be within the definition: secondly, that according to the practice of those engaged in the business of marine insurance the slip is the writing by which the contract is really made; thirdly, that as a matter of law the mere fact that parties intend that an agreement which they have arrived at shall be subsequently embodied in a more formal document does not prevent the earlier agreement from constituting a binding engagement. They go on to observe that the Court of Appeal in *Home Marine Insurance Co. v. Smith (ante)* was careful to limit its decision to the particular document, and to say nothing on the general question whether a slip can ever be stamped and sued upon. And they conclude their note upon the position, as they see it in England, thus: "It is, however, difficult to see how, in view of this decision of the Court of Appeal, it is now possible to contend that a cover-note which specifies the sum insured, and in other respects conforms with the requirements of the Stamp Act, is not a valid policy. Further, it seems difficult to distinguish the covering note, either as regards its form or its object, from an ordinary slip. Logically, the result seems to follow that an ordinary slip is a policy, and that Mathew, J.'s decision to the contrary has been impliedly overruled. But in view of the remarkable consequences which such a view would entail (which have already been pointed out)<sup>3</sup> it seems very unlikely that this view would be judicially approved. It may be pointed out that the language of sections 21 and 89 of the Marine Insurance Act, 1906, seems to support the view that a slip is not a contract of insurance, but only a memorandum of such contract. This, however, does not seem to be a conclusive answer to the contention that the slip is a writing whereby a contract of insurance is evidenced, within the definition of section 91 of the Stamp Act, and it is a

<sup>1</sup> Vol. XVIII, Art. 259.

<sup>2</sup> 1924, sec. 37.

<sup>3</sup> "*Prima facie*, therefore it does seem that on general principles the slip is a policy of insurance within the very wide definition of the Act. The consequences, however, of the adoption of this view, to which it must be conceded the wording of the Act of Parliament gives great support, are curious; for it seems to follow that every broker who procures the initialling of a slip and every underwriter who initials it, breaks the law and makes himself liable to a penalty." Arnould, 11th Ed., Vol. I, p. 54.

matter of regret that the legislature did not take advantage of the opportunity given by the passing of the Marine Insurance Act to settle this question."

We have now to enquire whether in India the long or short slip or any other document, purporting to record the terms of a contract for sea-insurance, is a document which, if made in India, affords the assured no protection in the sense that it has no legal sanction behind it, but binds the underwriters in honour only. The question thus propounded is not wholly *res integra*.

In 1888 the Judicial Committee<sup>1</sup> had before them the case of *Bhagwandas v. The Netherlands India Sea and Fire Insurance Co. of Batavia* (14 A.C. 83). This was a suit for specific performance of an alleged contract of marine insurance. The relevant facts were as follows: In March, 1885, one Macrory was owner of a vessel named *The Copeland Isle*. He suggested to the plaintiff Bhagwandas, a merchant doing business at Rangoon, Calcutta and Bombay, that he might charter *The Copeland Isle* on reasonable terms. It was in evidence that the plaintiff said to Macrory that if an open cover were given to him free of particular average he would charter the vessel. Eventually, the charterparty was brought to him by Macrory and the plaintiff then asked for the open cover, when Macrory gave him some six open cover-notes or slips. The plaintiff then signed the charterparty and proceeded to ship goods on the vessel named. In accordance with the cover-notes he thereafter received proper policies from every one except the agents of the defendant insurance company who, on demand by the plaintiff, refused to issue a policy. *The Copeland Isle* sailed and was totally lost in a cyclone. The plaintiff sued upon the cover-note in respect of which no policy had been issued. The Recorder of Rangoon dismissed the suit and the plaintiff appealed. The Privy Council regarded the open cover given to Macrory by the defendant company's Rangoon agents as a proposal to insure and Macrory as an intermediary. They held that when he handed the cover-note to the plaintiff it was a subsisting proposal capable of being accepted by the plaintiff and that the plaintiff's demand from the defendant's agent for a policy in terms of the cover-note constituted an acceptance; and that there was thereby created a binding contract of which the plaintiff was entitled to demand specific performance, and their lordships gave judgment in their usual form in that sense.

It is of course to be observed of this decision that it was before the Stamp Act of 1899. It is submitted, however, that the *ratio* of the decision has not been overruled.

In 1922 the High Court of Bombay had before it on appeal from its original side the case of *Tricamji Damji & Co. v. Virji Kanji* (24 Bom. L.R. 820). In this case the document which had to be construed was in respect of a cargo, and read as follows:—

"We accept the risk with regard to goods which may be shipped at the wharf in the port of Muscat.....the risks shall cease when, after the vessel has touched any port whatever, the goods shall have been landed at the wharf in the port of Bombay. This insurance is accepted without damage in accordance with the usage of English policy. The period fixed in respect of loss, etc., is six months.....the signatures are duly to be affixed to the stamped *pucca* (that is, formal) policy."

<sup>1</sup> Lord Fitzgerald, Lord Hobhouse, Lord Macnaghten and Sir Richard Couch.

The document was not stamped, but was initialled. The following passages from the judgment of Shah, C.J., are pertinent: "The question is whether the document in question is a 'policy of sea-insurance' within the meaning of the Indian Stamp Act or is merely a 'letter of cover or engagement to issue a policy of insurance' within the meaning of the 'General Exemption' relating to policies of insurance in Art. 47. Marten, J., is of opinion that the unstamped memorandum falls within the Exemption; and if that view is right, it is clear that, as it is not stamped, and as no stamp can be now received in respect of it, the suit will be unmaintainable. The whole question is whether the document in question satisfies the requirements of the definition of 'policy of sea-insurance' within the meaning of the Indian Stamp Act" . . . . "It is urged that in form it is only a protection note or a letter of cover and that the executants contemplated a formal policy to be drawn up later. It is no doubt true that the document does refer to a formal policy duly stamped to be prepared; and it may be said that, in form, it is not a policy of sea-insurance. But these considerations, in my opinion, are not decisive of the question as to whether the document in substance can be treated as a 'policy of sea-insurance', within the meaning of the Indian Stamp Act" . . . . "It is urged that this document is merely a 'contract for sea-insurance', and that under section 7, cl. (1), it cannot be valid unless it is expressed in a sea-policy. But a 'sea-policy', or policy of sea-insurance is defined under section 2, cl. (20), and if this document satisfies the requirements of that definition, I do not see why it should not be so treated. The essentials of a 'sea-policy' as indicated in section 7, cl. (3), are present in this case" . . . . "I think that initialling is sufficient to indicate the names within the meaning of section 7, cl. (3)" . . . . "The document in question, it seems to me, satisfies, though not in form but in substance, the requirements of the definition of a policy of sea-insurance." . . . . "It may be that the intention of the legislature was to render such documents inadmissible unless expressed in the form of a regular policy, except for the limited purpose of obtaining a proper policy. But, in my opinion, the definition in the Act leaves room for the view which I have taken; and unless the definition of section 7 is amended, I do not see how such a document could be excluded from its scope."

Three years later came the decision of the Judicial Committee<sup>1</sup> in *Surajmull Nagarmull v. Triton Insurance Co., Ltd.*, [1924-25] 52 I.A. 126; [1925] A.I.R. 83 (P.C.); 52 Cal. 408, 29 C.W.N. 893; 23 A.L.J. 105; [1925] M.W.N. 257; 81 I.C. 545. This was an appeal from the High Court of Calcutta. The suit was instituted in 1919 to recover Rs.24,997 as damages for breach of a contract alleged to have been made by the respondents to insure jute and hemp to be exported by the appellant to Europe. The alleged contract arose on an acceptance by word of mouth of a letter quoting a rate of premium, and on a declaration by word of mouth, not of the steamer by which the goods were to be shipped, but of the expected value of the plaintiff's goods to be loaded on board of her. The breach alleged was the defendant's refusal to issue a policy. The trial Judge (Pearson, J.) found the contract and the breach proved, and gave the plaintiffs a decree. The Court of Appeal (Sanderson, C.J., and Richardson, J.) differed from the trial Judge on the effect of the evidence and held that the contract was not established. No defence under the Stamp Act was pleaded or otherwise raised at any stage in the High Court; nor did their lordships in that court consider the Stamp Act

<sup>1</sup> Lord Sumner, Lord Phillimore, Sir John Edge and Sir Lawrence Jenkins.

*suo motu*. Before the Board, where the effect of section 7 (1) at once cropped up, it was submitted as then too late for the insurance company to take refuge behind that section. Citing *Nixon v. Albion Marine Insurance Co.*, [1867] L.R. 2 Ex. 338, their lordships dealt with the foregoing submission as follows: "The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset." In reference to the terms of sec. 7 (1) of the Indian Stamp Act, 1899, their lordships spoke of the enactment as "prohibitory", and their judgment continued: "It is not confined to affording a party a protection of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea-insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of s. 7 would defeat the provisions of the law laid down therein. In England this is well settled law: See *Fisher v. Liverpool Marine Insurance Co.*, [1874] L.R. 9 Q.B. 418; *Ionides v. Pacific Insurance Co.*, [1872] L.R. 7 Q.B. 517, *Xenos v. Wickham*, [1866] 2 H.L. 296; and there is no ground for construing the Indian Act, expressed in almost identical terms, in any different way. The observations of the High Court in *The Reference under the Stamp Act*, [1903] 1 L.R. 30 Cal. 565, distinguishing a contract for sea-insurance and a policy of sea-insurance seem to have been directed to another point, and *Bhagwandas v. Netherlands, etc., Insurance Co.* was before the Stamp Act. In their Lordships' view the contract alleged by the plaintiff was a contract for sea-insurance and nothing else, and, not being expressed in a policy, was unenforceable."

How far then does the foregoing decision of the Judicial Committee provide an answer to the question propounded? The student will remember a classical *dictum* of Lord Halsbury that a case is only an authority for what it decides. What, then, was decided in *Surajmull Nagarmull's case*? A letter quoting a rate of premium was verbally accepted. This was followed by a verbal declaration having no reference to any vessel but only to the expected value of goods to be shipped. The High Court had held that these circumstances did not create a binding contract of insurance. They so held altogether apart from any question of section 7 (1) of the Stamp Act. Moreover, the High Court even doubted the evidence upon which the allegations of fact in the pleadings rested. Their Lordships of the Judicial Committee held (a) that the contract alleged on the pleadings would, if proved, amount to a contract for sea-insurance and nothing else; and (b) that not being "expressed in a policy" such a contract was unenforceable. The reader will also note that the remedy sought was damages for an alleged breach of such a contract.

So the question whether a slip duly initialled and in the usual form, or a cover-note purporting to express the terms of a contract of sea-insurance, could fall within the definition of a sea-policy which is set forth in section 20 of the Stamp Act so as to be valid under section 7 (1) of the same statute, if properly stamped, was not propounded. Nor did their Lordships have to consider any such question. As to what

constitutes "expressed" for the purposes of section 7 (1) it had been decided in England upon the corresponding word appearing in section 93 of the English Stamp Act, 1891 (*Aktieselskabet v. Da Costa*, [1911] 1 K.B. 137), that the phrase "expressed in a sea-policy" meant that such a contract would be invalid if not in writing. Upon the facts, therefore, in *Surajmull Nagarmull*, the claim that the arrangement came to amount to a contract "expressed in a sea-policy" would hardly have been arguable, had it been made. In fact, however, the restrictive effect of section 7 of the Indian Stamp Act had not been considered by either of the courts below. In these circumstances the decision in *Surajmull Nagarmull* goes no further than deciding that where a litigant seeks relief for the breach of a contract of sea-insurance he must allege and prove some document valid under section 7 (1). This decision throws us back on all the relevant provisions of the Indian Stamp Act which have been set out above.<sup>1</sup> Accordingly it becomes necessary to approach the problem with an eye to those provisions, read as a whole.

As already observed, a slip, be it "long" or "short", or a cover-note issued by underwriters in accordance with custom, will manifestly embody the terms of the contract which will ultimately reappear in the more formal instrument.<sup>2</sup> Such a slip or cover-note then plainly falls within the definition of a policy of sea-insurance or sea-policy appearing in one or other or both of the clauses of section 2 (20). And this is the view of the Bombay High Court in the case cited above. It will not, however, be susceptible of proof as a policy of sea-insurance unless it is stamped as such. But, it is submitted, that once it be properly stamped, a suit would be maintainable upon it as upon a contract of sea-insurance "expressed in a sea-policy"—so long, that is, as in other respects the contract thus expressed and evidenced fulfilled the conditions set forth in section 7. It would be a question of fact, upon a view of the document relied upon, as to whether or not it did so conform to the requirements of the last-mentioned section. It is submitted, therefore, that neither on principle nor authority is there reason for supposing that other High Courts in India or the Judicial Committee itself would dissent from the views expressed by the learned Chief Justice in *Tricamji Damji's* case.

It may still be asked, however, whether in a case where the document or documents relied upon fall short of the requirements of section 2 (20) read with the provisions of section 7, but yet contain a sufficient record of an offer and an acceptance to insure ship or merchandise, the parties interested may sue for Specific Performance. True, the contract thus set up would, *ex hypothesi*, not be a valid contract for sea-insurance. But, on the assumption that consideration in the form of a premium had passed,<sup>3</sup> it may well be asked why is it not a contract within the meaning of the Indian Contract Act, and one capable of being specifically enforced? In the view submitted by the author such a contract would be so specifically enforceable, though only to the limited extent of entitling the litigant to an appropriate decree to that end: the essence of the contract being, as against the underwriters, the obligation to issue a sufficient instrument by way of policy. It is submitted that the words of the General Exemption which appear in Art. 47 of the Indian Stamp Act clearly contemplate a written "engagement to issue a policy of

<sup>1</sup> Pp. 121 *et seq.*, *ante*.

<sup>2</sup> The reader may here conveniently refer to the specimen "long slip" or "cover-note" set out on p. 119, *ante*.

<sup>3</sup> Or that pre-payment of premium, as is frequently the case, had been waived.

insurance" and regard such an engagement in writing as something which must fall into one or other of two categories, for which this article makes express provision as to stamping. But by the words of the same exemption such an engagement, whether stamped or not stamped, is made available "to compel the delivery of the policy therein mentioned". The word "compel" has no meaning in a statute unless it imports the notion of an appropriate legal sanction and an appropriate adjectival process.

The incidence of revenue statutes such as Stamp Acts in the law of other countries cannot be disregarded in the law relating to marine insurance, because of the particular law of contract which the Courts in India may find themselves compelled to apply. This topic will be found dealt with more at large in a later part of this chapter.

**Rectification.**—In the matter of rectification of instruments the power which courts of justice in India exercise, though now governed by statute,<sup>1</sup> takes its origin from the corresponding powers exercised by a court of equity in England. Accordingly these powers are exercised upon equitable principles now well-established.

The cardinal principle in virtue of which any party to an instrument may sue for its rectification is its failure to express the common intention of the parties to the contract. The recognition of this principle in turn rests upon the plain fact, sometimes overlooked, that the whole object of a written instrument in the law of contract is that it should accurately record the terms by which the parties intend to be bound. If it fail to do this, it is, as a record of those terms, largely worthless, while its existence in dishonest hands may be dangerous. For the purpose of rectifying such an instrument the Court must, from the best material available, first satisfy itself as to the true intention of the parties and then, in a proper case, proceed to amend the instrument in accordance with that intention. Fraud or common mistake are the only grounds upon which the Court can be moved.<sup>2</sup> The evidence, however, may disclose, not a common mistake, but an original failure in the parties themselves in arriving at that *consensus ad idem* without which there is in the eye of the law no contract at all. In such a case the Court has a discretion to cancel the instrument.

Rectification, therefore, will not, as a matter of principle, be ordered unless the Court is satisfied (a) as to the true intention of the parties, and (b) that the language of the instrument fails to express that intention. As a matter of practice rectification will not be ordered where there is not a prior actual contract by which to rectify the written document.<sup>3</sup> It is for the last-named reason that where rectification of a policy of marine insurance is sought, the part played by the slip or other memorandum of like utility in the transaction assumes an obvious importance. In England the decisions as to the rectification of policies of marine insurance are somewhat conflicting, the difficulty being chiefly one of evidence. Before the Stamp Act of 1795 courts of equity exercised the jurisdiction in a proper case. (*Motteux v. London Ass. Co.*, [1739] 1 Atkyns 545.) After the Stamp Acts had created difficulties about the tendering in evidence of unstamped documents, such as slips or covering notes, some judges refused to look at them. The present English Code

<sup>1</sup> The Specific Relief Act (I of 1877), Chapter III, secs. 31-34.

<sup>2</sup> *Ibid.*, sec. 31.

<sup>3</sup> *Fry, Specific Performance*, § 791.

to a large extent eases the situation in that regard, and the practice of the Courts in England today is to admit such documents in evidence for the purpose of seeing the true nature of the contract in its earliest recorded form. In India the same difficulty does not arise.

It is sometimes thought that an instrument may be rectified when the parties to the contract are under a common mistake of fact. So to suppose or to argue would be to commit a vulgar error; for, as Farran, J., said in *Haji Abdul Rahman v. The Bombay and Persia Steam Navigation Co.*, [1892] 16 Bom. 561, 565, 566, "Courts of equity do not rectify contracts. They may, and do, rectify instruments, purporting to have been made in pursuance of the terms of contracts." In the last-named case the Court pointed out that upon the evidence, and even assuming that both parties entertained the mistake alleged, the Court would not rectify, but would cancel the instrument. By section 34 of the Specific Relief Act "a contract in writing may first be rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced". By section 33 of the same statute it is provided that in proceedings wherein rectification is prayed "the Court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be". The last-named section is in aid of the application of principles long recognised in India (see the judgment of Jenkins, C.J., in *Dagdu v. Bhana*, [1904] 28 Bom. 420, 425-426). For recent English cases, see *The Aikshaw* case, [1893] 9 T.L.R. 605; *Spalding v. Crocker*, [1897] 2 Com. Cas. 189. *Empress Assurance Corp. v. Boeing*, [1905] 11 Com. Cas. 107, 114; *Emanuel & Co. v. Andrew Weir & Co.*, [1914] 30 T.L.R. 518; *Re London County Commercial Reinsurance Office, Ltd.*, [1922] (*supra*); *Symington & Co. v. Union Insurance Society of Canton, Ltd.*, [1928] 34 Com. Cas. 23, 233, C.A.

Minor corrections can be put right by the Court without the necessity of special proceedings. The Court will even insert a missing clause in an instrument of a well-known form, if clearly necessary to make sense of the whole. (*Redfern v. Bryning*, [1877] 6 Ch.D. 133.) It is now settled that if two instruments agree, but neither represents the true intentions of the parties, both documents can be rectified in the same proceedings. (*Craddock v. Hunt*, [1923] 2 Ch. 136 C.A., approved by the Judicial Committee in *United States v. Motor Trucks, etc.*, [1924] A.C. 196.)

Fraud in the making of an instrument against one or more of the parties to it has always been a good ground for seeking its rectification by the Court. Nor do the injured, if the fraud be proved, seek such a relief in vain. It will be sufficient for the purposes of this chapter to note that where the Court either on the ground of fraud or mistake is asked to rectify a policy of insurance, oral as well as documentary evidence is admissible to establish the relevant allegations.<sup>1</sup>

The Courts in India are divided upon the question whether parties are bound by instruments which plainly fail to express the contract, and whether they may counter-claim for rectification or are relegated to a suit therefor. The High Court of Calcutta has gone so far as to hold (*Anarullah v. Kailash*, [1882] 8 Cal. 118) that although an instrument by reason of fraud or mistake does not truly express the intention of the parties to it, it is nonetheless binding upon the litigant until he gets it rectified by a proper suit instituted for that purpose; and that he cannot

<sup>1</sup> Indian Evidence Act (I of 1872), sec. 92, proviso 1; and see *Maung Pe Gyi v. Hakim Ally*, [1923] 2 Rang. 113.

set up the failure of the instrument as a defence. The author associates himself with other writers in submitting that this view of the law is not correct. The High Court of Bombay in *Dagdu v. Bhana* (*supra*) has held that where the Court's rules do not permit of a counter-claim for rectification, such Courts may, in conformity with the principles of justice, equity and good conscience, give effect, as a plea, to those facts which would, in a suit brought for that purpose, entitle a plaintiff to rectification.

**Correction.**—Parties may, by consent, correct or otherwise alter the policy even after it is underwritten. And so long as the policy when thus altered conforms to what is required by law in a policy of sea-insurance the instrument so corrected is for all purposes valid. Policies of marine insurance usually involve more than one underwriter. Consequently an altered policy binds no one who has not assented to the alteration. Thus it has long been the practice to obtain the signatures of all the parties to the policy. It is to be collected from the relative cases that where the assured has effected any material alteration in the policy, such alteration avoids it, except as to those underwriters who have either signed or initialled the memorandum subsequent to the alteration, though, naturally, it is better to secure their signatures or initials to the actual alteration itself.<sup>1</sup>

#### 4. Construction of the Contract.

The peculiar nature of marine insurance and of the documents in which such contracts of insurance are embodied has given rise to certain special rules of construction; and in what follows these will be briefly described. It must, however, be remembered that over and above these special rules, there exist recognised canons of construction which apply to the interpretation of every class of contract which has been reduced to writing. In what follows the reader will be reminded of these canons. One further topic, closely related to those which have just been alluded to, concerns the law which a Court in India will, as it is thought, apply in cases where a contract of marine insurance may have been made in one jurisdiction, to be performed in another, and its validity or interpretation has to be adjudicated upon in yet a third. Our survey of the law of marine insurance in British India would be incomplete without some discussion of the problems which may thus present themselves.

**Canons of Construction.**—It has been settled law in England from the time of *Ford v. Breech*, [1848] 11 Q.B. 852, 866, that a written contract ought to receive that construction which its language will admit; that will best effectuate the intention of the parties; and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in their efforts to express it.<sup>2</sup> Where the language used admits of two constructions, the one consistent with the apparent general tenour and the other inconsistent with it, the former construction is to be preferred. In looking at the mere verbal signification of a phrase or sentence, especially where such a sentence be ungrammatically formed, the Court will bear in mind the maxim *mala*

<sup>1</sup> For examples of material and immaterial alterations the reader is referred to Arnould, 11th Ed., §§ 43 and 44.

<sup>2</sup> The words of the judgment in this case thus embody three canons which may be expressed in a single sentence: the construction must be reasonable, liberal and favourable.

*grammatica non vitiat chartam.*<sup>1</sup> The maxims by which the Court will be guided in construing written contracts are the same at law and in equity. In order to understand, and, by a proper construction, to give effect to the intention of the parties, the contract must be read as a whole.

**Special Rules.**—While it may be true that there is not in law, so far as matters of principle be concerned, any difference between methods of construction employed by the Courts to determine commercial contracts when the same have been reduced to writing and those which are used for the interpretation of any other class of instrument (*Southwell v. Bouditch*, [1866] 1 C.P.D. 374, 376), the fact remains that the form in which policies of marine insurance are usually cast is such that a number of special rules of construction have of necessity been gradually evolved, so as to deal with circumstances more or less peculiar to this type of contract. It is to these rules that the attention of the reader is now directed.

**Usage.**—In so many important directions has the custom of merchants permeated not only the business of insurance, but the law relating to commerce generally, that in some sense a knowledge of mercantile usage is essential to the interpretation of all such contracts. Thus far marine insurance marches with all other forms of commercial activity out of which litigation may arise. In so far as mercantile usage may have become so crystallized as to have become part of the law merchant, that usage is treated as implicit in every commercial contract. Naturally marine insurance presents no exception in this regard. Nay more, one may say that persons engaged in marine insurance are pre-eminent among those who are constantly contributing to the development of the law merchant. True, there was at one time a tendency to suppose that there could be no such increase of commercial custom as would compel the Courts to accept any further accretion to the law merchant. That opinion, however, is no longer entertained. (*Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q.B.D. 658; *Edelstein v. Schuler & Co.*, [1902] 2 K.B. 144.)

One effect of such recognition of usage as qualifies it to be treated as part of the law merchant is that, for some considerable time at any rate, no evidence inconsistent with it can be admitted. (*Goodwin v. Roberts*, [1875] 10 Ex. 337, 357.) If an usage be so notorious that the Courts will take judicial notice of it, it needs no evidence to establish the fact. In all other cases, the usage must be proved by admissible evidence. The party denying the usage relied on may lead evidence to establish that such an usage does not exist; or to prove its illegality or unreasonableness;<sup>2</sup> or to support a substantive case to the effect that it formed no part of the agreement sued upon.

Marine insurance from its very nature has led to usages which are peculiar to that trade: using the word "trade" in the wide sense of signifying a particular kind of commercial activity or calling. Such usage, though confined and so "peculiar" to a particular trade, may be of a general nature throughout that trade. In some instances, too, an usage,

<sup>1</sup> Mere bad grammar does not vitiate a written instrument.

<sup>2</sup> For a marine insurance case in India in which a so-called usage relied upon to defeat the claimant was held unreasonable, see *Bansordas Bhogilal v. Karrieing Mohonlal*, [1868] 1 Bom. H.C.R. 299; and for another case in which the attempt to set up a similar usage as a defence failed, see *Kanji Dwarkadas v. Haridas Purshottam*, [1911] 36 Bom. 484. See, also, Indian usages mentioned at p. 213, post.

though confined to a particular *locality*, may be so *constant* that underwriters, in their dealings with their clients, not only could not overlook such usage, but, as a matter of fact, will be seen to be dealing upon the footing that such local usage largely affects the nature of the risks.

Section 1 of the Indian Contract Act expressly disclaims any intention of affecting "any usage or custom of trade". At one time this section was so construed as to make it read as if the usage or custom of trade must be one not inconsistent with anything enacted by the statute, but this has been pointed out by the Judicial Committee to have proceeded upon a misreading of the section. (*Irrawaddy Flotilla Co. v. Bhagwandas*, [1891] 18 I.A. 121, 127.)

The part played by such usage in contracts of marine insurance has been referred to in three celebrated *dicta*: two from the lips of Lord Mansfield and another recorded of a distinguished contemporary judge. "Usage" said the former "is always considered in policies of insurance, even where the words are plain" (*Preston v. Greenwood*, [1784] 4 Dougl. 28), and again "the question is, whether the usage has not explained the generality of the words. If it has, every man who contracts under an usage does it as if the point of usage were inserted in the contract in terms." In *Long v. Allen*, [1784] 4 Dougl. 276, Buller, J., thus laid down the law: "in policies of insurance . . . a great latitude of construction as to usage has been admitted"; and again, "Usage not only explains but controls the policy". It is the latter *dictum* over which some controversy has arisen between a number of learned persons. Duer,<sup>1</sup> writing a little more than half a century after Buller, J.'s pronouncement, thought him strictly accurate in his use of the word "control". "In controlling, the usage does not contradict the words: it merely varies, by restraining or enlarging, their application." Arnould, writing a decade later,<sup>2</sup> is plainly of the same opinion. But a contemporary<sup>3</sup> of Judge Duer in the United States considered the word "control" to be unfortunate. So do the editors of the 11th Edition of Arnould. If, say they, interpretation or explanation is all that is meant by it, then, certainly, contradiction is in no sense implied. But they feel it to be<sup>4</sup> "difficult to see how usage, which 'varies, by restraining or enlarging', the application of words, does not *pro tanto* contradict them". It seems to us, however, that what the doctrine of usage does, is to lead the right-minded party to a commercial document and a properly instructed judge, not towards an interpretation of words appearing in the written instrument which such words *could not* bear—for that were to contradict the plain language of the contract—but towards a reading which they *might* and, having regard to the usage, must *necessarily* bear. In that sense, which appears to accord with Lord Mansfield's view of the matter, the use of the word "control" both by Buller, J., and by Judge Duer would seem to be at once accurate and apt.

The importance of rightly applying the *dicta* mentioned above lies in the fact that usage cannot be set up for the purpose of contradicting what is plain enough from the terms of the instrument upon which the parties rely.

Thus more than a century ago (*Blackett v. Royal Exchange Ass. Co.*, [1832] 2 Cr. & J. 244), Lord Lyndhurst refused to admit an alleged usage of Lloyd's not to pay for boats slung on the ship's quarter. Much later the Court refused to admit a so-called special usage as to jettison.

<sup>1</sup> *Marine Insurance*, pp. 245, 246.

<sup>2</sup> *Phillips*, 4th Ed., § 133.

<sup>3</sup> Arnould, 2nd Ed., p. 70.

<sup>4</sup> Arnould, p. 76 n. (h).

(*Dickinson v. Jardine*, [1868] 3 C.P. 638.) And later again, in *Attwood v. Sellar*, [1880] 5 Q.B.D. 286 C.A., the Court regarded as invalid and of no effect an alleged practice of average adjusters to charge certain *general* average expenses to *particular* average. On the other hand it very early became settled law that usages of a particular trade known to all parties to a transaction will be regarded by the Courts as having been within their contemplation when they entered into a contract which would normally be affected, if not actually governed, by such usage. See *Salvador v. Hopkins*, [1765] 3 Burr. 1707; *Gregory v. Christie*, [1784] 3 Dougl. 419; *Farquharson v. Hunter*, [1785] 1 Park 105. A more modern instance is *Hart v. Standard Ins. Co.*, [1889] 22 Q.B.D. 499, 501, C.A. This principle is recognised by the English Code of today wherein we find it stated<sup>1</sup> "where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract". Thus in *Matvicff v. Crosfield*, [1903] 8 Com. Cas. 120, a custom of Lloyd's as to settlement was held not to be binding on one ignorant of it.

It is not, of course, necessary that the usage relied upon in a marine insurance case should be one confined to business of that character. For example, in *British and Foreign Marine Insurance Co. v. Gaunt*, [1921] 2 A.C. 41, the House of Lords, affirming the Court of Appeal, held that the usage as to deck cargo meant the usage of sea carriers in stowing certain kinds of goods on deck.<sup>2</sup> See also the usage as to deck cargo on canal boats in *Apollinaris Co. v. Nord Deutscher Insurance Co.*, [1904] 1 K.B. 252.

*Particular words and phrases.*—To say that the Court, in construing particular words and phrases, will look first to the ordinary meaning, and then to the meaning which such words or phrases have for those who employ them in connection with the special class of business to which they relate, is but to state a rule of general application in the law of contract.

It is a question of fact in each case, to be proved by admissible evidence, whether they have the ordinary or the special meaning. It is again but a question of fact, to be similarly proved, whether in the particular instance they were intended by the parties to be read in the ordinary or in the secondary sense. So far we are mentioning no rule which does not equally apply to every class of commercial contract.

We do, however, meet with something in the nature of a special rule of construction when we see the method which Lord Ellenborough adopted in *Parr v. Anderson*, [1805] 6 East 202. For there he laid it down as proper to enquire in what manner other parties to contracts containing the form of words which figured in the instrument before him, commonly acted upon them as shown by former instances. This method had become settled practice in insurance cases by 1845, and it led Duer to remark that such a mode of interpreting a contract by a reference to the practice of other parties in similar cases was almost "peculiar to a policy of insurance" and was "by no means easy to reconcile with the ordinary rules of evidence".<sup>3</sup>

<sup>1</sup> Sec. 89.

<sup>2</sup> For a detailed study of usage as affecting not only marine insurance but contracts of carriage by sea the reader is referred to Arnould, 11th Ed., §§ 55-66 and 71-72, and to Carver's Carriage by Sea, §§ 160-200.

<sup>3</sup> Duer, *Marine Insurance*, New York, 1845-6, Vol. I, p. 187.

The methods of determining the full import of a secondary meaning, when such a meaning is set up by one of the parties to the contract, involve evidence of "usage" in that regard, and therefore depend upon the same principles, touching the admissibility of all such evidence, as have been noted above. The chain of cases illustrating the application of these principles to the interpretation of particular words or phrases is a long one. It must suffice for the purposes of the present chapter to give two modern instances where the courts have accepted the secondary meaning set up. In *Mersey Mutual Underwriting Association v. Poland*, [1910] 15 Com. Cas. 205, Hamilton, J., admitted evidence to the effect that the phrase "port risk" had a well-recognised meaning at Lloyd's, whereby under a "port risk" policy the risk is at an end when the insured vessel leaves her anchorage. In *North Shipping Co. v. Union Marine Insurance Co.*, [1918] 24 Com. Cas. 83, the Court found, as of fact, that the words "laid up", figuring in the phrase "laid up in port", did not mean "stationary" or "tied up", but that they had a customary meaning by virtue of which a vessel may be regarded as still "laid up", even when she be loading or discharging cargo, or undergoing repairs.

*Words printed and words written.*—In no class of contract are there more confusing methods of recording the various terms than in the present day types of marine insurance policies. This state of things is referable in large measure to an attempt to make worn-out phraseology—designed to meet conditions no longer obtaining in the trade—serve a new purpose. When, a little later in this chapter, the reader's attention will be directed to the traditional form of a policy of marine insurance, and to the numerous interpolations which have been rendered necessary in order to compel crabbed age and youth somehow to live together, the reason for yet further special rules of construction with regard to this class of document will be appreciated. It is customary, the reader will find, at any rate in British policies and in those which derive directly from the traditional form of those instruments, to find a printed contract with unnumbered clauses, and couched in somewhat antique phraseology, taking up the middle of the page, while down one or both of the margins appear a series of numbered clauses, usually printed in smaller type and drawn in the modern fashion. In addition he may find short statements (designed to create "exceptions") impressed upon the face of the document by means of a rubber stamp, and appearing in just any space which may be found able to contain them. Further stipulations may be added in manuscript. Not infrequently the terms of the more modern accretions to the original printed document are, on the face of them, irreconcilable with the terms of the original text, which are often found to have been left uncorrected. The need of some special rules of construction to meet such circumstances is obvious.

To that end we have the rule that written clauses—in which must be included certain stock forms of stipulation so common as to be frequently inserted by the use of a rubber stamp—have greater weight than the printed and formal parts of the policy. To a like intent is the rule that all such written words are to be more strictly construed than are those which are found to be set up in type. In India, where commercial documents frequently make use of more than one language, kindred difficulties of construction to those mentioned above sometimes arise. For example in *Hajee Esmail Hajee Sidick & Anr. v. Shamji Poonjani*, [1878] 2 Bom. 550, the policy covered 680 bags of rice shipped from Calcutta to Jeddah. The instrument was in the traditional English form, printed, and in the English language. There were, however, two

additional clauses, both in manuscript, one of them being couched in the English and the other in the Gujrati language. The first of these additional clauses read "warranted free of particular average unless stranded, sunk or burnt". The clause in Gujrati was said to be to the following effect: "insurance upon the goods to be without damage. The loss arising from damage is to be on the head of the owner of the goods." The Court gave effect to the Gujrati provision by reading "damage" as equivalent to "particular average" and so construing the clause as to mean that the underwriters should not be liable for damage (in the sense of particular average) unless the vessel were sunk or burnt, when the underwriters would, of course, be liable for it under the clear terms of the first of the manuscript warranties. In this manner the Court succeeded in reconciling the words of both the manuscript clauses. In brief, the Court is never to be led by the mere *form* of a policy to adopt an interpretation which the substance, read as a whole, does not support. A single instance of the application of the last-named rule must suffice. In *Dudgeon v. Pembroke*, [1877] 2 A.C. 284, the facts were that a Lloyd's policy in common form had been manifestly filled up with the intention of recording the terms of a "time" policy. This had been done without cancelling a number of other printed clauses clearly applicable only to a "voyage" policy. An attempt was made to insist upon the uncanceled clauses. Such a case had succeeded in the Exchequer Chamber, but failed on appeal to the House of Lords. "It has been suggested" said the Lord Chancellor on that occasion "that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less or something more than a time policy. But the practice of mercantile men of writing into their printed forms the terms by which they desire to describe and limit the risk intended to be insured against, without striking out the words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in Courts of Law, to permit of any such conclusion."

Nevertheless carelessness in the foregoing respect may well have the effect of confusing and dividing even a very strong court of justice called upon to decide how such a policy should be read. A modern instance may perhaps give point to the foregoing observation. In *Marten v. Vestey*, [1920] A.C. 307, the material facts were that by a marine policy in the usual form the ship was insured for a voyage, the *terminus ad quem* being described as her "final port". According to the usual practice the words "upon the goods and merchandises until the same be there discharged and safely landed" were left in the policy. Two members of the House were of opinion that these words could not be disregarded, and that the effect of them was to keep the policy on the ship alive until the cargo should have been discharged. Lord Dunedin observed that this clause in terms referred only to the duration of the risk on goods, and regarded it as wholly wrong to apply the words of such a clause to a voyage policy on a ship. In brief, he considered that the policy should be construed as if this printed clause had been erased. The learned Lord gave his reasons for so holding in these words: "I venture to say that no underwriter who has undertaken a risk on ship alone by means of a voyage policy, ever dreams that his undertaking is to be read in the light of what the printed form says about goods. After all, the question is what was the contract made by the parties, and it is our business to decide that and not to form rules as to how

commercial men ought to conduct their business. And in face of the universal practice of underwriters to use the form in this way, it is, in my opinion, untrue to say that they have contracted that an insurance of ship alone shall be interpreted in the light of printed words which are appropriate only when the insurance is not effected on ship alone but on goods."

*Inexplicable Ambiguity.*—The last special rule of construction to which the reader's attention must be drawn is that which is to be applied where stipulations are inserted for the protection of the underwriter, and the same prove to be couched in language so ambiguous as to be inexplicable even by a proper admission of extrinsic evidence. In such a case it is said that the construction will lean towards the side of the assured rather than that of the insurer. The usual authorities cited are *Blackett v. Royal Exchange Assurance Co.* (*supra*), and *Birrel v. Dryer*, [1884] 9 A.C. 345. Such a rule was certainly applied by the Judicial Committee so late as 1913 in the case of a fire policy. (*National Protector Fire Insurance Co. v. Nivert*, [1913] 108 L.T. 390.) The *ratio decidendi* in the case of *Etherington & Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, namely, that an ambiguous clause should be construed against an insurance company, because the policy is an instrument prepared in its office, is not always applicable in marine insurance, since in the case of an ordinary Lloyd's policy it is the broker, as the assured's own agent, who prepares the instrument in its final form.

**What law to be applied.**—Jurists are accustomed, when discussing the particular national law which a given contract may attract, to speak of (i) the *lex loci contractus*, meaning the law of the country in which the contract is made, (ii) of the *lex loci solutionis*, meaning the law of the country in which the contract is to be performed, and (iii) of the *lex loci fori*, or *lex fori*,<sup>1</sup> as meaning the law of the country whose Courts are eventually called upon to adjudicate upon the rights of the parties.

Contracts of marine insurance like many other mercantile contracts constantly involve more than one jurisdiction, and not infrequently do they expressly attract the law of more than one country. As, then, the duty of a Court, when called upon to adjudicate between the parties to a commercial contract, naturally entails the construction of that contract, it often happens that the scope of the enquiry includes the determination of the question: by what law did the parties intend to be bound? The history of commercial litigation is, moreover, replete with instances where the intention of the parties in the foregoing respect cannot be discovered from the terms of the instrument, or even satisfactorily established by extrinsic evidence. Where this happens it has long been found necessary to lay down certain principles for the guidance of Courts so placed. No help in this regard is obtainable from the provisions of the Indian Contract Act, which is silent upon this subject. In England the principles upon which the Courts will act in all such matters are now firmly established; and as the Courts in India have frequently adopted those principles<sup>2</sup> as a guide to the solution of similar problems of their

<sup>1</sup> Literally "the law of the forum". Originally the word *forum* connoted an open and public meeting-place, often where a market was held. Later, in Latin history, the *forum* in Rome was used for the determination of suits or actions at law.

<sup>2</sup> *Cow v. The Governors of Bishop Cotton's School*, [1874] Punj. Rec. 85; *Abdul Aziz v. Appayyaasami*, [1903] 27 Mad. 131 = 31 I.A. 1; *Lachmi Narain v. Fateh Bahadur*, [1902] 25 All. 195.

own, a brief account of what may be styled the settled law in England will be offered to the reader.

As it is the duty of the Court, in adjudicating upon contracts, not only properly to construe the relative instruments, but to give effect to their terms, the Court does not scruple to apply a foreign law where the expressed intention of the parties is to be bound by that law.

In the absence of any such direct expression the intention must be collected from the terms of the contract read as a whole in the light of such surrounding circumstances as may be established by admissible evidence.

Where the examination of the instrument and the extrinsic evidence, if any, leaves the matter in doubt, the courts in England presume that the law of the place where the contract is made is that which the parties intended as the footing upon which they dealt. (*Lloyd v. Guibert*, [1865] 1 Q.B. 115; *Re Missouri Steamship Co.*, [1889] 42 Ch.D. 321; *Hamlin v. Talisker Distillery*, [1894] A.C. 202; *Superior v. La Cloche*, [1902] A.C. 446; *Pena Copper Mines v. Rio Tinto Co.*, [1912] 105 L.T. 846.) So, where there was a contract for the carriage of goods in a Dutch vessel, but the written contract had been signed in England and cast in the English language, it was held to be governed by English law. (*Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, [1883] 12 Q.B.D. 521; see also, *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; [1912] A.C. 52.) In all these cases the law governing the contract was held to be the *lex loci contractus*.

The next presumption to be noticed arises when the contract is made in one country, to be performed either wholly or partly in another, and the contracting parties have failed by their stipulations to attract the law of any specified nation. In such a case the law governing the contract is to be presumed to be the *lex loci solutionis*. (*Benaim v. Debono*, [1924] A.C. 514, 520.) So a contract made in London between two firms of English domicile for the sale of Algerian merchandise, the same to be shipped by a French company at a port in Algeria, but on vessels chartered by the buyers in London and to be paid for in London, was held an English contract.

Another presumption is that contracts of affreightment are to be governed by the law of the ship's flag. So in *Lloyd v. Guibert* (*supra*) a British subject chartered a French ship at a port in Danish West Indies for a voyage from a port in Haiti to the French port of Havre or the English ports of Liverpool or London. The ship flew the French flag. While on a voyage between Haiti and Liverpool she put in to a Portuguese port where the Master borrowed money upon a bottomry bond. The Court held that the liability of the French shipowners to indemnify the British charterer for money paid by the latter to the Portuguese bond-holder was to be determined by French law.

In *Royal Exchange Assurance Corporation v. Sjöforsakrings Aktiebolaget Vega*, [1902] 2 K.B. 384, the contract provided that the parties were to be bound by the decision of the courts of a particular country. This was held to raise a strong presumption that the parties intended their contract to be governed by the law of that country. A similar presumption was held to arise where the parties undertook to submit to arbitration in a specified country. (*Norske Atlas Ins. Co. v. London General Ins. Co.*, [1927] 43 T.L.R. 541.) Thus, where defendants, a firm of Scottish merchants in business in India, sold certain goods in Java to merchants in China to be shipped from Java to Bombay under contracts containing an arbitration clause to the effect that such arbitration was to be by

London brokers in the usual manner, and that the submission might be made a rule of the High Court of Justice, the Court held that the contract bore the implication that it was to be governed by English law. (*N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.*, [1927] A.C. 604.)

The *lex fori* will be the proper law to govern the contract so far as the following matters be concerned:—

(i) Everything in the nature of adjectival law forms part of the *lex fori*. So, for example, although a contract be foreign in origin it may, under the rules already mentioned, be enforceable in British India; and where a suit is instituted to that end, the provisions of the Civil Procedure Code and of any other rules of procedure having the force of law (e.g., the provisions of the Letters Patent of a High Court, touching such questions as jurisdiction and methods of trial and appeal, as also any procedural rules and orders published by such High Courts under the powers conferred upon them, whether by their Letters Patent or otherwise) would apply to the conduct of the case, without any regard to corresponding provisions of the foreign law. For the rule is that in everything incidental to the remedy sought for a breach of contract, the *lex loci fori* in which that remedy is prayed must prevail. (*Huber v. Steiner*, [1835] 2 Scott 304; *Rothschild v. Currie*, [1841] 1 Q.B. 43, 49; *The Colorado*, [1923] P. 102.)

(ii) Any question of limitation is to be decided by the *lex fori* unless the contract should be wholly void according to the law governing the contractual relations of the parties. (*Huber v. Steiner* (*supra*); and *Slavonski v. La Pelleterie*, [1927] 137 L.T. 645.)

(iii) Claims to set-off or to counter-claim, being in their nature adjectival law, are to be admitted or not in accordance with what is allowable under the *lex fori*.

(iv) Again, where what is sought to be enforced amounts to an equitable right alleged to arise out of the contract sued upon, that right is to be measured by principles recognised under the *lex fori*. (*American Surety Co. of New York v. Wrightson*, [1910] 16 Com. Cas. 37.)

(v) Lastly, it is to be noted that revenue laws are regarded as part of the *lex fori*. Upon this doctrine was founded the reluctance of the Courts in England to pay any attention to foreign revenue laws, where, in actions brought in England, such laws were cited for the purpose of supporting a submission that the contract sued upon was illegal. In *Planché v. Fletcher*, [1779] 1 Dougl. 251, Lord Mansfield decided against such a submission in a case where the adventure covered by the policy of insurance admittedly involved a fraud on the revenue of a foreign State. The case was particularly bad in that regard, since papers had been fabricated in aid of the fraud. The *ratio* of Lord Mansfield's decision in this, and in *Lever v. Fletcher*, [1780] 1 Park. Ins. 507, was (to use his own words) that the law of England paid "no attention to the revenue laws of another State". Lord Mansfield had, indeed, earlier stated the rule in even wider language and in terms suggesting that the law of England was not alone in its disregard of such revenue laws. For in *Holman v. Johnson*, [1775] 1 Cowp. 341, he had been heard to say "no country ever takes notice of the revenue laws of another". Thus the English Courts expected no other standpoint from a foreign subject. "The subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this." (So *per* Lord Abinger C.B. in *Pellecat v. Angell*, [1835] 2 C.M. & R. 311, 313.) A modern judge, himself a commercial lawyer of the highest eminence, has however expressed the opinion

that "the early authorities on this point require reconsideration, in view of the obligations of international comity as now understood" (*per* Scrutton, L.J., in *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, 300). How far any such reconsideration is to go has not yet been decided by any Court in England. The rule, thus stated by Lord Mansfield, has not in practice been departed from by the Courts in England, though the case of *Foster v. Driscoll*, [1929] 1 K.B. 470, has, at any rate in one instance, been cited as an indication that Lord Mansfield's rule was no longer to be followed.<sup>1</sup> In that case a partnership was held to be illegal on the ground that its object was to run spirits into the United States of America. But the law of the United States thus to be infringed consisted of an amendment of the Constitution known as the "Prohibition" amendment. Neither this nor the incidental Federal legislation, whose object was to prevent altogether the importation of wines and spirits, was in any sense revenue law. The case therefore is in reality not in point.

The Stamp Acts are included in the category of revenue law. Thus a contract if sued upon in England (and which should have been stamped according to a foreign law by which the making of the contract was governed) will not become unenforceable in an English Court by reason of the absence of the foreign stamps. On the other hand, if it is a contract—and a contract of marine insurance is of that kind—which, according to English law, would have to be stamped to the extent required by the relevant statute, the law of the English *forum* would prevent the contract being enforced unless the instrument were properly stamped. So where a risk under a Lloyd's policy was reinsured with a Swedish Company it was held that the policy of reinsurance must conform to the English stamp laws if it is to be enforced in England. (*Royal Exchange v. Vega*, [1901] 2 K.B. 567, affirmed on appeal, [1902] 2 K.B. 384.) It is submitted that the Courts in India would adopt a like attitude in both the cases put.

*Conflict of Laws.*—The reader will remember that contracts of affreightment are in general (*i.e.*, unless the intention of the parties is plainly otherwise) governed by the law of the flag.<sup>2</sup> What then, it may be asked, is the position of a contract of marine insurance covering goods on board a foreign ship? The answer is that the law of the flag does not, unless expressly attracted under the rules already explained, affect the contract of insurance at all. Thus an English underwriter who has insured goods shipped by an English merchant on a foreign vessel is said not to be affected by the law of the flag (*Wavertree Sailing Ship Co. v. Love*, [1897] A.C. 373 P.C.).<sup>3</sup> So in *Greer v. Pool*, [1880] 5 Q.B.D. 272, a case involving an English policy of marine insurance containing a foreign adjustment clause, Lush, L.J., expressed the view that an insurer bound by an English policy may, if he chooses, stipulate in the policy that it "shall be construed in whole or in part according to the law of any foreign State, as if it had been made in and by a subject of that foreign State, and the policy in question", he went on, "does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law and without regard to the nationality of the vessel".

<sup>1</sup> Chitty on Contracts, 19th Ed., p. 114.

<sup>2</sup> See pp. 90, 138. *ante*.

<sup>3</sup> See Dicey's Conflict of Laws, 4th Ed., pp. 652, 655.

### 5. Subject of the Contract.

Colloquially, we are entitled to speak—and commercial men commonly do so—of particular items of property, such as the ship itself or the goods put on board of her, as being the “subject” of insurance. But if we are to use the strict language required of lawyers we must remember that it is not the property itself, but the risk of damage to or loss of that property which is covered by a contract of insurance. When the ship itself, the risk to which we desire to insure against, is put upon the water, or when the goods whose loss will mean so much to the trader are stowed away in her holds, there is, what the old books call, an “adventure”, one which from its nature may properly be described as a “marine” adventure. Likewise, the risks themselves which begin the moment the vessel is launched or the goods put upon a barge or lighter to go out to her, have been styled “maritime risks”; while the kind of event which may occasion the loss or the damage to the property so adventured are thought of as “maritime perils”. In the English Code what may properly be made the subject of a contract of marine insurance is expressed with reference to these notions of marine adventure and of maritime perils, as the same have been defined by authoritative decisions in the past. It is thought that the Courts in India will accept what is thus expressed in the relative section of that Code for the very good reason that it does not go beyond the chain of cases which were already in existence when the Marine Insurance Act of 1906 was placed upon the Statute Book.<sup>1</sup> For these reasons it is proposed to set out below the terms of section 3 of that Act together with a reference to the respective authorities for the propositions stated :—

“3—(1) Subject to the provisions of this act every lawful marine adventure may be the subject of a contract of marine insurance (*Wilson v. Jones*, [1867] 2 Ex. 139).

(2) In particular there is a marine adventure where—

(a) any ship, goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as ‘insurable property’;

(b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils” (*Rankin v. Potter*, [1873] 6 H.L. 83; *Price v. Maritime Ins. Co.*, [1905] 5 Com. Cas. 332 and [1901] 2 K.B. 412 C.A.; *Moran Galloway, etc. v. Uzielli*, [1905] 2 K.B. 553);

“(c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.” (*Boehm v. Bell*, [1799] 8 T.R. 154; *Tatham v. Burr*, [1898] A.C. 382—a case of liability for running down another vessel; *Cunard & Co. v. Marten*, [1902] 2 K.B. 624.)

<sup>1</sup> The following more recent cases exemplify, but do not extend, the principles stated. In *Wyllie v. Povah*, [1907] 12 Com. Cas. 317, the subject of insurance were the “profits on cargo”. It was a “commission” which was at risk in *Mentz Decker & Co. v. Maritime Ins. Co.*, [1909] 15 Com. Cas. 17; and in *New Zealand Shipping Co. v. Duke*, [1914] 2 K.B. 682, the facts showed that it had been necessary to transport passengers after an accident. Thus, the various unforeseen disbursements, occasioned on that account, including passage money, were made the subject of insurance.

"Maritime perils" means "the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy". (*Thames & Mersey Insurance Co. v. Hamilton Fraser & Co.*, [1886-7] 17 Q.B.D. 195; 12 A.C. 484.) This was the case of the celebrated *Inchmaree*; the decision of the House of Lords leading to the framing of a special clause for use in policies of marine insurance, which has since been known as "the Inchmaree clause".<sup>1</sup>

**Lawful Marine Adventure.**—It may be broadly stated that every marine adventure would be lawful which is not either contrary to the positive law of the jurisdiction governing the contract, or which is not manifestly incompatible with public morals in a wide sense of the term. Thus in India are attracted the provisions of sections 23 and 30 of the Indian Contract Act.<sup>2</sup> Naturally, where the policy sued on in India either expressly, or by necessary implication in accordance with the foregoing rules, attracts a foreign law of contract, the courts in India would, it is conceived, refuse to enforce it, if it be established that such a contract would be unlawful by the foreign law thus attracted, even if the agreement would not be unlawful in India.

The Court requires the plainest language to show that the basis of the contract would be illegal either under its own local law or under the foreign law as the case may be: the rule being that if a contract be susceptible of two constructions, one of which would validate it and the other would have the opposite effect, the former construction is to be preferred. There have been occasions when an insurer has argued that consistently with the words of the policy the adventure might have been a lawful one, and that he had no means of knowing that it was not. When this argument was raised in a case where it had been established that the intention, at any rate, was to embark upon an illegal adventure, Lord Ellenborough faced the underwriter with the following dilemma "The policies," said he, "being large enough to cover an illegal adventure, and an illegal adventure being in fact intended to be covered by them, if the underwriter really meant to protect the adventure, his subscription was illegal, and consequently his present demand, being grounded on an illegal consideration, cannot be sustained. If he did not mean to protect that adventure, but supposed that some other and lawful adventure was intended by the assured, then, admitting the subscription to have been an innocent act on his part, there will be no consideration at all to support his present demand." (*Jenkins v. Power*, [1817] 6 M. & S. 282, 289, where the underwriter was suing the broker for unpaid premiums on a policy in its language wide enough to comprehend an illegal adventure which in fact was intended by the assured.)

A considerable volume of case-law, not all of it consistent in texture, surrounds the topic of an unlawful adventure or an unlawful part of a ship's voyage, and as to the effect of such an adventure on the liability of parties to policies of marine insurance. The editors of the 11th edition of Arnould sum up the position in propositional form thus<sup>3</sup> :—

<sup>1</sup> As to which, see pp. 181, 182, *post*.

<sup>2</sup> See Chapter II, pp. 26 and 27, *ante*.

<sup>3</sup> Pages 955, 956.

1. Any illegality in the prior stages or at the outset of an integral voyage vitiates a policy, though effected only to protect some later stage of it in which there is no illegality.

2. An illegality in any part of an entire risk, or voyage insured, vitiates the insurance as to the whole of it.

3. The illegality of a wholly distinct and separate voyage can have no effect on the voyage described in the policy.

4. Where the policy is thus avoided in consequence of the illegality of the risk, the underwriter is entirely discharged from all liability, and this although he himself was aware of the illegal nature of the adventure.

The fourth of the above propositions needs, perhaps, some comment. It represents the considered opinion of one of the most eminent of 18th century jurists<sup>1</sup> and seems to have been accepted without question by Lord Mansfield.<sup>2</sup> The point arose in a recent Calcutta case (*Commercial Union Assurance Co. v. Binraj Johurmull & Ors.*, [1935] 52 C.L.J. 60; [1931] 1 Comp. Cas. 125), but was not thrashed out, inasmuch as counsel for the underwriters did not press the defence. The Court, however, definitely had its attention drawn to the possibility of the contract between the merchant and the post office being one disallowed by post office regulations. Inasmuch, however, as the underwriters were admittedly aware of those regulations and of the despatch of the parcel being in breach of them, the defence (not pleaded in the Court of first instance) was somewhat frowned upon by the Bench.

Assuming, however, that it were established by examining the relative statute and the rule-making powers of the postal authorities that the transit in suit was one forbidden by something having the force of law, could the Court shut its eyes to the illegality of the venture? It is submitted it could not.<sup>3</sup> And if the venture be illegal, the validity of the contract of insurance falls with it. In England, moreover, as it is by statute provided that only a "lawful" marine adventure can be made the subject-matter of insurance, such an illegality cannot be waived. So, too, no *estoppel* could be raised so as to defeat the intention of the legislature. It is submitted that the same considerations would apply in India where a policy purported to cover a contract illegal under section 23 of the Contract Act. The topic of a contract alleged to be illegal under section 30 of the Contract Act, involving a principle of some importance in the branch of the law to which this chapter is devoted, arose in 1901 in the High Court of Madras. (*Vappakandu Marakayar v. Annamali Chetti*, [1901] 25 Mad. 561.) There the plaintiff lent money on the security of the defendant's ship. The terms of the loan were that the money would be repaid on the 20th of March, 1897, with interest at 18 per cent if the ship returned safely on completion of the voyage. Otherwise, there could be no recovery of either principal or interest. The vessel was already on her way when this document was executed; and had, in fact, been already lost at sea. The lender strove, on the ground that the ship was not in existence at the time of the document, to recover the money which he had lent and which the document acknowledged. Davis, J., held that it was a mere wagering contract, and the plaintiff could not recover. It is submitted that this case was wrongly decided; that it is impossible to reconcile the *ratio* of this decision with the Bombay decision

<sup>1</sup> Bynkershoek. 1 Quest. juris. public. lib., l.c. 21.

<sup>2</sup> *Holman v. Johnson*, [1775] 1 Cowp. 341.

<sup>3</sup> *Gedge v. Royal Exchange Ass. Corp.*, [1900] 2 Q.B. 214.

in the earlier case of *Jivanji Noorbhai, etc.* [1880] 4 Bom. 305 (discussed at p. 109, *ante*, or with the long-recognized custom of merchants whereby money can be obtained on these very conditions upon what is styled a bottomry bond.<sup>1</sup> It is submitted that although the transaction, like all other such transactions, is governed by so strong an element of chance as to render the risk a notable one, it is not for that reason a mere wager.<sup>2</sup>

**Insurable Property.**—In the section of the English Code which we have just examined (*vide* sub-sec. (2), clause (a) of the same) certain terms are used in a somewhat restricted sense. It may be well here to explain them; for the English Code has striven to use these words in the sense they bear in a marine policy. Thus “ship” includes “the hull, materials and outfit, stores and provisions for the officers and crew, and in the case of vessels engaged in special trade, the ordinary fittings requisite for that trade, and also in the case of steamships the machinery, boilers and coals and engine stores, if owned by the assured”.<sup>3</sup> In practice, however, hull and machinery are often distinguished for the purpose of separate insurance.

The term “goods” means goods “in the nature of merchandise and does not include personal effects or provisions and stores for use on board”.<sup>4</sup> Thus personal effects<sup>5</sup> must be separately insured. So, too, must be not only “live stock”, properly so-called, but any living animal, if the risk to it is to be covered by insurance at all.

“Moveables”, as used in the English Code, mean “any moveable tangible property other than the ship, and include money, valuable securities and other documents”.<sup>6</sup> Thus live cattle and postal packets are moveables within the meaning of the English statute. (*Baring Bros. v. Marine Ins. Co.*, [1893] W.N. 164; *The Pomeranian*, [1895] P. 349; *Sleigh v. Tyser*, [1900] 2 Q.B. 333.) The reader will note, therefore, that the word “moveables” as so used has a more limited application than the words “moveable property” within the meaning of the Indian Transfer of Property Act (IV of 1882).

“Freight” is a word which in common parlance has more than one meaning in commercial circles; and so is used with more than one signification in commercial law. It is not uncommon to find the word used of the object of a transportation charge as well as of the charge itself. So, in the United States of America a train is said to be “carrying freight”, and what is in England a “goods train” is there known as a “freight train”. So, vessels exclusively built for the carriage of cargo are often called “freighters”. In the law of marine insurance the word is restricted to payment of money for particular hireage or particular services. In section 90 of the English Code we find a fairly exhaustive interpretation of the word as used in the act “unless the context or subject-matter otherwise requires”. The relative passage is in these words:—

“Freight” includes “the profit derivable by a shipowner from the employment of the ship to carry his own goods or moveables as well as freight payable by a third party, but does not include passage money.”

Some further comment is necessary as to the use and effect of this word in contracts of marine insurance. First of all freight may be paid

<sup>1</sup> See pp. 108 *et seq.*, *ante*.

<sup>2</sup> See, as to wagering contracts generally, Chapter II, p. 27, *ante*.

<sup>3</sup> Schedule I, rule 15.

<sup>4</sup> *Ibid.*, rule 17.

<sup>5</sup> As to Master's effects, see *Duff v. Mackenzie*, [1857] 3 C.B.N.S. 16.

<sup>6</sup> Marine Insurance Act, 1906, sec. 90.

in advance. Where this is done there is a conflict of law as to its effect. By the law of most foreign countries "advance freight" is repayable in case of loss. (*Byrne v. Schiller*, [1871] 6 Ex. 20; and in Exchequer Chamber 319, 325), and where the foreign law is thus attracted, he who has so prepaid the freight will have no insurable interest in it. Where, however, such prepaid freight is not repayable under the law governing the contract, the person advancing the freight has an insurable interest. (*Smith v. Pyman*, [1891] 1 Q.B. 742, 744, and see section 12 of the English Code; see also *Allison v. Bristol Insurance Co.*, [1876] 1 A.C. 208, 238, where the cases are reviewed.) As by the law of England advance freight is not repayable in case of loss, except where the contract otherwise provides, the person advancing the freight has in that country an insurable interest, while the shipowner has not. It is submitted that in India the Courts will give effect to the custom obtaining generally or locally as to "advance freight".

In *Dufourcel v. Bishop*, [1886] 18 Q.B.D. 373, it was decided that though advance freight under the law of England may not be repayable in case of loss, yet inasmuch as the shipowner may be liable in damages to the cargo-owner if the loss arises by reason of his negligence or default, the amount advanced towards the freight must be taken into account in estimating the damages for which the shipowner may be made answerable.

Money advanced to a shipowner by a charterer, or by one who is shipping goods on his vessel, may fall into one of three categories: (a) it may be advance freight properly so-called, and not repayable in case of loss; (b) it may be such an advance freight as is specially repayable in the like case; (c) it may be no more than money lent which, therefore, would be repayable in any event. It is obvious that money falling within the last-named category is not 'at risk', in a maritime sense, and cannot therefore be subject-matter of marine insurance. (*The Salacia*, [1862] Lush. 578, 582.)

The student of marine insurance or indeed of shipping law generally, will meet, in addition to the uses of the words mentioned above, the following expressions in which the word "freight" appears, all relating to charges payable in respect of the vessel or her cargo. "Chartered freight", "Bill of Lading freight", "Contingency freight", "Back freight", "Pro rata freight", "Lump sum or lump freight" and "Dead freight". These terms will now be briefly explained.

The first two are thus described in *Scottish Shire Line v. London and Provincial Marine and General Insurance Co., Ltd.*, [1912] 3 K.B. 51, 65. "Chartered freight is the remuneration paid to a shipowner who hires a ship, or part of it, generally with an added contract that the shipowner's captain shall sign bills of lading for the charterer. On the other hand, 'bill of lading freight' is *prima facie* the shipowner's contracted remuneration for the carriage of goods in his own ship by his own servants. No doubt the word 'freight' extends to other engagements which are binding although they do not take the form of either a charter or a bill of lading, such as berth notes."

An owner of goods often has to pay full freight for their carriage, although they arrive damaged. Their safe arrival at their destination will, in many cases, have the effect of enhancing their value. The insured interest in such an enhancement of value is, in reality, akin to an insurance on profits. Yet such a policy of insurance is frequently, though misleadingly, styled one on "contingency freight".

"Back freight" refers to the shipowner's remuneration for carrying goods beyond their original destination, in cases where the consignee has failed to take delivery or to give instructions as to disposal.

"Pro rata freight" refers to freight which may become payable proportionately to the part of the voyage accomplished, or to the part of the cargo delivered.

"Lump sum freight" or "lump freight" refers to the fixed sum which a charterer often agrees to pay for an entire voyage or a series of voyages covered by the charterparty, irrespective of the amount of goods carried.

"Dead freight" is not really freight at all, but represents the compensation payable in a case where the charterer has failed to ship a full cargo. (*Kish v. Taylor*, [1912] A.C. 602, 613.)

### 6. *The form and substance of the Policy.*

The reader will already have had a certain amount of introduction to the nature of the instrument which commonly embodies a contract of marine insurance and which is termed "the Policy".<sup>1</sup> The traditional form of a marine policy, evolved in England almost wholly by the instrumentality of underwriters who were members of Lloyd's, has been more or less adversely criticized by every student of marine insurance. It has survived, for all that. Moreover, its main features both as to form and language are to be found, with some admixture of more modern phraseology, in practically every marine policy framed in the English language the world over. Its terms have been analysed in every leading text-book upon the subject of marine insurance; and to these analyses and criticisms the reader is referred for a more detailed study of a Lloyd's policy as used today than can be afforded in this present chapter.

For the practical purposes we have in mind (especially in view of the needs of Indian students of this subject) we propose to examine a local form of policy in use in India today and issued by an old established insurance company of Indian origin, and, later, a form of policy specially designed for covering the transit of merchandise on inland waterways. The terms of these policies will be examined clause by clause. By this method will be revealed the truth of the statement that a modern policy of marine insurance embodies not merely one contract but several, and that, consequently, to call it a "bundle of contracts" is to give no bad description of it.

### *A SPECIMEN POLICY OF INSURANCE, WITH A COMMENTARY.*

*WHEREAS it hath been proposed to the TRITON INSURANCE COMPANY, LIMITED, by X Y Z as well in his own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this Policy does may or shall appertain in part or in all to make with the said Company the insurance hereinafter mentioned and described*

The above sentence is in form what lawyers call a "recital". If it be compared with the traditional form of a Lloyd's policy it will be

<sup>1</sup> See pp. 5, 78-80, *ante*.

seen to depart in some measure from that form. The matters of substance, however, are preserved, and the purpose is the same, namely: to accept a proposal, whether the same be made by the assured or by someone on his behalf, and furthermore to extend protection to all who possess an insurable interest at the time when the insurance is effected or who may acquire such an interest during the currency of the risk. If, however, the person, who is indicated by the letters "X Y Z" in the recital above exhibited, did not in fact intend to insure on behalf of some particular person, the mere fact that that person may otherwise come within the very general description which the recital sets forth, will not of itself suffice to obtain for such a person the benefit of the policy. (*Boston Fruit Co. v. British & Marine Insurance Co.*, [1906] A.C. 336.) If, however, the intention of the person effecting the insurance be to include the individual who had or might have the requisite insurable interest, the benefit of the policy will not be denied him, even if he did not authorise the insurance to be effected for him. Indeed such an one may adopt and claim the benefit of the insurance even after the loss. This principle is accepted by the English Code and expressly provided for in section 86 thereof.

*NOW THIS POLICY WITNESSETH that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of \_\_\_\_\_ as a premium at and after the rate of \_\_\_\_\_ per cent for such Insurance the said Company takes upon itself the burden of such Insurance to the amount of \_\_\_\_\_ and promises and agrees with the Insured, their Executors, Administrators and Assigns in all respects truly to perform and fulfil the contract contained in this policy.*

Here we have a departure from the Lloyd's form; for the latter, towards its close, embodies an acknowledgment of the receipt of the premium which is expressly referred to as "the consideration due . . . for this assurance by the assured". In the specimen policy examined the consideration is expressed to be the *promise* to pay the premium.

Where the insurance is effected by the broker (as is usual in England) it is to the broker that the underwriter looks for payment of the premium. The broker's claim to be paid the equivalent sum so disbursed by him *plus* his commission from the assured, depends upon the ordinary contractual relationship of principal and agent. That the policy is one issued by a company cannot alter the custom that it is to the broker and not the assured that the insurer looks for the premium. (*Universo Insurance Co. of Milan v. Merchant's Marine Insurance Co.*, [1897] 2 Q.B. 93.) (For the position of the broker in India, see p. 213, *post*.)

*And it is hereby agreed and declared that the said Insurance shall be and is an Insurance at and from \_\_\_\_\_ upon any kinds of Goods and Merchandise and Freight of and in the Ship or Vessel called the \_\_\_\_\_ whereof \_\_\_\_\_ is at present Master or whoever shall go for Master in the said Ship or Vessel. Including risk of Craft and Boats to and from the Ship or Vessel. Each Craft or Lighter to be deemed a separate insurance.*

In the above specimen clause there are three blank spaces; one which, when filled up, will identify the place of departure, the next the vessel, and the third its Master. It is necessary to read such a clause

when filled up with the provisions of the succeeding clause before it can be said whether the policy is to be construed as a Time policy, a Voyage policy, or both. If some of the material particulars touching the exact amount of goods to be covered be not identified at the time of the execution of the policy, it will be deemed a Floating policy, and the risk under it will not attach until such time as subsequent declarations are made on the part of the assured by which the venture in all its details can be sufficiently identified.

In a Lloyd's policy, and sometimes in other policies framed in more or less imitation of a Lloyd's policy, the intention that the policy (whether a floating policy or otherwise) shall cover ship as well as goods is expressed by placing the capital letters S.G. in a conspicuous place on the instrument.

The specimen which the reader is now examining in terms sufficiently indicates that the policy is designed to cover freight and/or merchandise, and that, moreover, in a named vessel.

Where the policy is upon a ship, and is expressed "at and from" a named place, and the ship happens to be, on the date and time when the policy is effected, at the place named therein and in *good safety* there, the risk attaches immediately. (*Palmer v. Marshall*, [1831] 8 Bing. 79.) If it be otherwise, the risk begins from the moment she arrives in *good safety* at the place named. If, however, the ship be insured simply "from" a place named, the risk attaches from the moment she commences her voyage.

"*Good safety*" is a phrase having a special meaning in marine insurance. It can only be used of a ship which (a) is in the possession of the assured, (b) is not in capture or arrest, and (c) which, in a nautical sense, is safely anchored, moored, or properly secured (i.e., "tied up") alongside a pier, wharf or jetty. At her port of destination a ship is not deemed to be in *good safety* unless her position is such as permits her an opportunity of discharging her cargo at the place she intends for that purpose. A ship placed in Quarantine is not deemed to be in *good safety*. (*Samuel v. Royal Exchange Ass. Co.*, [1828] 8 B. & C. 119.) At the date of the last-named authority it had already been decided that if she be so berthed that she only needs to await her turn for discharging cargo without altering her position, she is to be deemed in *good safety*. (*Angerstein v. Bell*, [1795] 1 Park's Mar. Ins., 8th Ed., p. 54.)

In the specimen under consideration, the expression "at and from" will not have any particular effect in the case of goods, having regard to the terms of the next succeeding clauses, save to the extent that the words when followed by a place-name will identify the port at which the risk will commence. For the words attracting date and time the reader must therefore look to succeeding clauses.

It has been settled law since *Hurry v. Royal Exchange, etc.*, [1801] 2 B. & P. 430, and is now recognized by the English Code,<sup>1</sup> that where goods or other moveables are insured from the loading thereof the risk does not attach until they are actually on board; and the underwriter therefore is not liable for them while in transit between shore and ship.<sup>2</sup> Conversely and with regard to the end of the voyage, where the words of the policy on merchandise do not expressly provide for a transit from

<sup>1</sup> By Schedule 1, rule 4.

<sup>2</sup> Unless of course port custom intervenes. If by the custom goods are regularly landed by means of lighters the risk continues until goods be safely landed from the lighters. (*Hurry v. Royal Exchange, etc.*, *supra*.)

ship to shore, the underwriters are not liable for anything occurring to the goods once they are over the side of the particular vessel named in the Policy. It will be noticed, however, from the terms of one of the next clauses (namely, that reading "*including risk of craft and boats to and from the ship or vessel*"), that in the specimen policy we are examining the underwriters are accepting risks from shore to shore, and from what immediately follows (namely, the clause reading "*each craft or lighter to be deemed a separate insurance*") that this policy provides a concrete example of a bundle of separate contracts comprising as many different insurances as there are craft or vessels employed in the carriage of the assured's goods; and that the risk consequently will run from the moment when the first lighter is laden with his goods or with some of them at the port of departure, to the time when the last lighter successfully discharges its burden at the port of destination.

In *Tyabji Mulla Mahomedbhai v. South British Insurance Co.*, [1917] 42 I.C. 636, the court had to consider certain policies on goods "*until landed, including the risk of craft to and from the ship*" and others in which the material words were "*until they shall be safely landed from on board the said vessel at the aforesaid port of Karachi including risk of craft to and from the ship*". When the goods covered by the policy were in fact brought alongside the jetty in lighters it was found impossible to get the requisite labour to unload them, it being the festival of *B'kr-Id*. As, however, there was just sufficient labour to put a small consignment of other goods on board one of the same lighters for transference to the same ship, this lighter was allowed to push off on the new task, carrying back the insured goods whence they had come. Somewhere in the fairway the lighter, with this mixed cargo on board, struck a sand-bank, heeled over and foundered, whereby some of the insured goods were lost and other parts of the consignment damaged. The court held the underwriters not liable, upon the ground that such an employment of this lighter could never have been within the contemplation of the parties, and to be quite outside the scope of the words of the clause when naturally and reasonably construed.

*And it is also agreed and declared that the subject-matter of this Policy as between the Insured and the said Company, so far as concerns this Policy shall be and is as follows upon*

Here will follow all such particulars as will sufficiently identify, in the case of a policy on ship, the vessel or vessels to be covered; and, in the case of merchandise, by stating its nature, the number of packages and their marks, as, in similar manner, will identify the property. Here too, in a Valued policy, will be stated the value of the ship (sometimes distinguishing for such purposes the vessel itself from the machinery); in the case of goods the values will be expressed in accordance with the different classes of merchandise or other moveables covered. In an Unvalued policy no figures will be stated.

Where the intention is that the value shall be taken as the sum for which the ship or goods are shown as covered, the two words "*so valued*" usually follow the words identifying the subject-matter.

It sometimes happens that a ship is erroneously described by name, or that more than one ship of the same name might, at first sight, suggest a real ambiguity in an essential term of the contract. Here, however, in accordance with the principle already alluded to, whereby the Court will strive to validate rather than invalidate a contract, if it appears that

there was a real consensus *ad idem* in the matter of the ship, and only an erroneous or apparently confusing description of her in the policy, the error will be treated as immaterial.<sup>1</sup>

The value of the property insured once stated and accepted is conclusive between the underwriters and the assured, except for the purpose of determining whether there has been "a constructive total loss". But an exorbitant valuation may be evidence of fraud. Apart from fraud, and when the valuation is *bona fide*, the same is binding. (*Barker v. Janson*, [1868] 3 C.P. 306; *The Main*, [1894] P. 320.) In *Balmoral Company v. Marten*, [1902] A.C. 511, the ship had been insured by the defendant, and its value as stated in the policy was £33,000. The ship incurred salvage expenses as well as a general average loss. The real value of the ship was subsequently proved to be £40,000 and the rights of the parties by the average statement were adjusted upon the footing that £40,000 was the contributory value of the ship. The liability of the underwriters was held to extend to 33-40ths of the salvage and general average losses, i.e., to pay in the proportion of the insured value to the contributory or salvage value.

*And the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight, Goods and Merchandise from the time when the Goods or Merchandise shall be laden on board the said Ship or Vessel, Craft or Boat or Railway Wagon as above and continue until the said Goods and Merchandise be discharged and safely landed as above.*

In this clause the reader's attention is first to be directed to the appearance of the word "time". This word imports date as well as hour. Unless therefore the date and hour at which the risk is to begin to run is a matter of pre-agreement and stated in the long or short slip (if not also in the policy), the risk will commence to run at the date and hour when, in fact, the property insured is taken on board the particular ship mentioned in the policy, or, where there is a clause accepting risks to and from the vessel named in the policy, when the property insured begins its transit to the ship; and continues until the goods be finally discharged either from the vessel or from the last craft employed at the port of destination, and have been safely landed therefrom. The words in the clause under examination provide for the possibility of the form being used to cover a through insurance by land as well as by water. It is for that purpose that the words "railway wagon" appear. Some marine policies are drawn so as to provide for a warehouse to warehouse insurance by means of a specially-drawn "warehouse to warehouse" clause somewhere inserted.

Where the insurance is meant to cover transit by river or by some light craft from shore to ship, or *vice versa*, in ports subject to sudden squalls, the element of time may be of the utmost importance. Accordingly it were prudent to provide, at any rate in the long or short slip, for an agreement that the time when each craft begins loading shall be properly certified and that the risk *pro rata* will run from the hour named. The agreement should further provide for a declaration of these timings being subsequently endorsed upon the policy.

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<sup>1</sup> Thus applying the maxim *falsa demonstratio non nocet* ("a mere error in describing does no hurt").

Where an hour is so stated, the time will be presumed to be the local time of the place where the contract was executed. A stipulation to the contrary will, of course, rebut the presumption. If, say, the time, for the purposes of the commencement of the risk, be computed in that or any other prescribed manner, it seems reasonably plain that the hour when the risk terminates should be computed upon the same basis; otherwise the duration of the risk might be artificially altered according to the direction in which the vessel sails. For policies made in England, Greenwich Mean Time (as varied by the Summer Time Acts, 1916 and 1922) will be applied, unless some intention to the contrary is to be gathered from the terms of the policy read with the relative long and short slips.

In India the question of an exact hour may well give rise to more difficulty. Wherefore it would be wise to state the relative time in such terms as "Calcutta" Time, "Bombay" Time, "Central Indian" Time and so forth. A further possible complication from the fact that the record of time in the ship's log may need suitable correction, makes it all the more important that the basis for computing time should be a matter of pre-agreement clearly stated in some document which would be admissible in evidence.

It remains to point out that where the subject-matter is insured under a voyage policy commencing "at or from" or simply "from" a named place, there is an implied condition that the adventure shall be commenced within a *reasonable time*, and that if the adventure be not so commenced, the underwriters may avoid the policy. (*De Wolf v. Archangel Insurance Co.*, [1874] 9 Q.B. 451, 457.) It has been said that what is "reasonable time" is a question of fact. (*Hick v. Raymond and Reid*, [1893] A.C. 22, 32.) It is, however, well settled that though a ship be named in a policy, the risk under which commences "at and from" or simply "from" a named place, the ship is not required to be at the port named at the time the policy is executed. But the implied condition referred to above will be used against her, if her delay in arriving be such as has the effect of materially altering the risk: as for instance, so as to change a summer into a winter risk. (*Hull v. Cooper*, [1811] 14 East. 479; *Marine Insurance Co. v. Stearns*, [1901] 2 K.B. 912.) It is, indeed, no answer that the delay itself was caused by perils of the seas or otherwise was unavoidable. So, in such a case, the party injured by an unreasonable delay may avoid the contract.

It may be noted that the English Code<sup>1</sup> has a provision which goes beyond the authorities in protection of the assured in certain cases where an underwriter seeks to avoid a policy on the ground of delay in commencing the adventure. The relative provision is thus worded: "the implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition". It is conceived that the equitable view of the matter which informs the foregoing sub-section might well be accepted and applied by the Courts in India.

The above clause, it will be observed, is so drawn as also to cover an insurance on freight, if the same be intended by the parties. The English Code<sup>2</sup> provides a guide to the pre-existing law upon the construction of a policy for freight by two rules respectively founded upon *Foley v. United Marine Insurance Co.*, [1870] 5 C.P. 155, and *Jones v.*

<sup>1</sup> Sec. 42 (2).

<sup>2</sup> Schedule I, rule 3, cls. (c) and (d).

*Neptune Insurance Co.*, [1872] 7 Q.B. 702, 706, 707; with which may be compared *Barber v. Fleming*, [1889] 5 Q.B. 59 and *The Copernicus*, [1896] P. 237. The relative rules are thus worded:—

"(c) Where chartered freight is insured 'at and from' a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(d) Where freight, other than chartered freight, is payable without special conditions and is insured 'at and from' a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo."

*And that it shall be lawful for the said Ship or Vessel so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever, in the course of her said voyage for all necessary purposes without prejudice to this Insurance.*

This clause is commonly known as the "touch and stay" clause. Such a clause was construed very early in the 19th century. (*Gairdner v. Senhouse*, [1810] 3 Taunt. 16.) A mere "touch and stay" clause materially differs in its effect from a clause expressly giving liberty to "touch stay and trade" during the voyage, or (in a Time policy) during the period, covered by the insurance. Though such a clause as the one we are examining does not purport to give liberty to "touch stay and trade", trading, in fact, will not be forbidden and so will not be outside the scope of the protection afforded by the general words of the policy, so long as such trading in fact causes no delay.

This clause and the real liberty granted by it cannot well be understood without some study of the law relating to what is termed "deviation": a topic, however, which is sufficiently extensive in its ramifications to demand separate treatment.<sup>1</sup> It must suffice for the moment, therefore, to state that the history of marine adventure very early demonstrated to those who were ready to shoulder the risks attending such adventures the abundant opportunities which shippers and Master Mariners had of increasing those risks beyond anything contemplated by those who made themselves liable for them. Accordingly, we find the Courts steadily developing the doctrine that the risk only attached to a specific adventure in the nature of a voyage, and that any conduct pursued by the vessel or by those who controlled her which could not be brought within what might be called the "contemplated programme" regarding her passage from the *terminus a quo* to the *terminus ad quem*, was outside the risk covered by the policy. The ordinary risks, however, which attended any sea voyage by sailing vessels, and the many unforeseen events connected with the lives of those on board, involved, as all the world knew, the necessity from time to time to put into a port or to cast anchor sufficiently near to a coast as to be able to communicate with the shore. The duration of such a "touching" or "staying", as was brought about by circumstances of necessity, was often not predictable. Accordingly, where necessity called, or some object intimately connected with, and even in furtherance of the agreed marine adventure, manifestly

<sup>1</sup> See p. 111, *ante*, and pp. 173 *et seq.*, *post*, under the caption "Deviation".

involved a departure from the contemplated passage between the one terminus and the other, it became necessary to rule that a particular kind of departure should not necessarily be deemed such a *deviation* or *turning away* from the contemplated voyage as vitiated the policy.

In the result there has been achieved by a long course of decisions something in the nature of a compromise between the two principles: the one by which the insurer is to be protected from an unwarranted departure from the voyage as contemplated by the contract, the other whereby the assured is not to lose the indemnity for which he has bargained and paid just at the moment he needs that indemnity, when the deviation from the projected passage has been occasioned by circumstances which were either unavoidable, or themselves constitute a justification as being in the interests of the successful prosecution of the voyage itself. In pursuance of this compromise, and as testifying to a recognition of the manifold circumstances in virtue of which a ship may properly touch or stay at places on, or may even turn off, her normal course, without prejudice to the contract of insurance, the "touch and stay clause" was framed. Its inclusion in marine policies is now-a-days universal.

*And touching the adventures and perils which the said Company is contented to bear and does take upon itself in this Voyage. they are of the Seas, Fire, Pirates, Rovers, Assailing Thieves, Jettisons, Barratry of the Masters and Mariners and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the subject-matter of this Insurance or any part thereof.*

This clause as drawn represents a modification of the time-honoured words used to comprehend the risks assumed in a Lloyd's policy, and which today usually run as follows:—

"They are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart,<sup>1</sup> surprisals, takings at sea, arrests, restraints and detentions of all kings, princes<sup>2</sup> and people of what nation, condition, or quality soever, barratry of the Master and Mariners and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, etc., or any part thereof."<sup>3</sup>

"... of the seas."—The words "perils of the seas" comprehend such as arise from winds, waves, lightning, rocks, shoals,<sup>4</sup> collisions, and in general all causes of loss and damage to the property insured arising from the elements, or from inevitable accidents other than those of capture and detention.

<sup>1</sup> Formerly, and more properly, styled "Letters of Marque". They issued from the Lords of the Admiralty or from a Vice-Admiralty Jurisdiction overseas and were addressed to commanders of merchant ships authorizing reprisals as reparations for damages sustained by such merchant ships through enemies at sea. They issued either in time of open war, or in peace, where attempts to procure legal redress for such injuries had failed. So far as Great Britain is concerned they have for some time fallen into desuetude.

<sup>2</sup> In some modern policies drawn upon this model the word "Usurpers" has been inserted here.

<sup>3</sup> The words in italics represent omissions from the clause under examination.

<sup>4</sup> Is a word used indifferently for shallow water or for a sand bank or bar which makes for shallow water where the bank is submerged. Perhaps the nearest equivalent in an Indian language is the Bengalee "chur" or "char", a word denoting a bank formed in the bed of a river by the constant deposit of silt.

In order to understand how the words accepting these risks have been construed the student must remember that the ordinary and expected action of wind and water upon the ship is not a peril within the meaning of this clause. What is insured against are the extraordinary and unlooked-for misfortunes which are caused by the elements acting in a fortuitous manner. This is not to say that there need be extraordinary violence of the winds or waves. It has been well said that "the indemnity is against accidents which may happen, not against events which must".<sup>1</sup> For a vessel to strike against a rock in fair weather amounts to a peril of the sea, unless she be deliberately misnavigated so as to produce that result. Ordinary misnavigation, including negligence other than wilful, may, if it results in the proximate cause of the loss, viz., the piercing of the hull and consequent inrush of sea water, amount to a peril of the seas covered by this clause. (*The Xantho*, [1887] 12 A.C. 503; *Trinder & Co. v. Thames, etc., Marine Insurance Co.*, [1898] 2 Q.B. 114.) Thus, damage done by rats, which has the effect of preventing a ship sailing, is not a peril "of the seas". On the other hand, if by means of the ravages of rats, sea water finds its way into the ship with consequent damage to cargo, there is a loss occasioned by a peril "of the seas". (*Hamilton v. Pandorf*, [1887] 12 A.C. 518; *Cf. E. D. Sassoon v. Western Ass. Co.*, [1912] A.C. 561.) At first sight it may not seem easy to reconcile the decision in *Hamilton v. Pandorf* with that of *Sassoon v. Western Ass. Co.*, for in the latter case the facts were that goods stowed in a hulk became damaged by sea water. The water had found its way in owing to the old and leaky condition of the vessel. The loss occasioned was held not one brought about by perils of the seas. This decision was followed in *Grant Smith & Co. v. Seattle Dry Dock Co.*, [1920] A.C. 162 P.C.: a decision which would be binding on Courts in India. There, what had happened was that a floating dock had been insured against marine risks. Owing to some fault in construction it capsized in port and was lost. The event was held not to be a peril of the seas. But the student must observe that the ratio of the decision in *Hamilton v. Pandorf* depended upon damage to an otherwise good vessel by animals, consequent upon which sea water entered the vessel; while in the two last-mentioned cases the respective vessels had each of them inherent defects. The existing English law on the extent of this "peril" was considered and applied in India by the High Court at Calcutta in *Stewart v. New Zealand Ins. Co.*, [1911] 18 C.W.N. 991. In that case a boat had been insured for one year. The risks covered included "perils of the seas". The boat was proved to have sunk in fair weather and smooth water without any assignable cause. It was held not covered by the terms of the policy. *The Xantho* (*supra*) was followed, and two other English decisions, namely, *Anderson v. Morice*, [1874] 10 C.P. 58 and *Blackburn v. Liverpool and Brazil River Plate S.N. Co.*, [1902] 1 K.B. 290, were considered and distinguished. In *Thames and Mersey Marine Insurance Co. v. Hamilton* (*supra*), a ship named "*The Inchmaree*" sustained so much damage to a pump which was being used for filling boilers while the ship lay at anchor prior to sailing, that there was a complete breakdown of the apparatus. This breakdown was proved to have been ultimately referable to carelessness on the part of somebody, who should have seen to it that a certain valve was kept open. The case went to the House of Lords, where it was decided that the ultimate damage was not caused either by "perils of

<sup>1</sup> Per Lord Herschell in *The Xantho*, [1887] 12 A.C. 503, 509. See also *Merchants Trading Co. v. Universal Marine Co.*, cited in 9 Q.B.D. at 596 per Lush, J.

the seas" or by "any cause similar thereto", and, consequently, that the insurers were not liable under the policy. This decision resulted in the framing of a special clause in policies of marine insurance, the detail and effect of which will be dealt with hereafter.

Loss "by wear and tear" of the ship and its appurtenances is thus not a peril of the seas, in that such loss occurs naturally and inevitably in the course of the every-day work of a ship. So the parting of a rope or cable under ordinary circumstances, the splitting of a sail in ordinary weather, damage to a cable or anchor under ordinary conditions of wind and weather, deterioration of masts and spars in the ordinary service of the ship, are all of them classed as cases of "wear and tear" for which an underwriter is not liable under this clause. Thus, too, damage resulting from the mere springing of a leak not traceable to some fortuitous occurrence during the voyage was held mere "wear and tear". (*Hamilton Fraser & Co. v. Pandorf & Co.*, [1887] 12 A.C. 518, 523, 424.)<sup>1</sup> Finally we have the case of *The Grigorios* in the House of Lords where it was held (by a majority) that the deliberate scuttling of a vessel by the Master with the connivance of the owner is not a loss by perils of the seas (*Samuel v. Dumas*, [1924] A.C. 431), with which we may compare the early case of *Bondrett v. Hentigg*, [1816] Holt (N.P.) 149, where the plundering of shipwrecked goods upon a shore by a number of "wreckers" was classified as a "peril of the seas".

*Fire*.—The construe of this term in the policy has in the past raised a number of difficulties; and an attempt to formulate a rule of construction to be embodied in schedule I of the English Code was abandoned on the ground that the suggested rule was based upon decisions some of which were thought likely not to stand the test of reconsideration. In examining this term, therefore, the author proposes to set forth the decisions which he conceives the Courts in India might be disposed to follow.

It was very early decided that the term will cover fire produced by lightning or in some manner brought about by an enemy or occasioned deliberately by setting fire to the ship in order to prevent her capture or to meet the danger of the spread of some contagious disease. (*Gordon v. Rimmington*, [1807] 1 Camp. 123-124.) Again, where in a policy of insurance on freight, a loss of such freight was occasioned by steps taken to prevent a fire, which otherwise would certainly have broken out with consequent destruction of cargo, the underwriter was held liable to the extent of the loss of freight involved. (*The Knight of St. Michael*, [1898] P. 30.)<sup>2</sup> In the last-named case it appeared clear that it would either be a loss by fire or otherwise within the clause. It might, it is submitted, equally be held (so far as any expense incurred was concerned) to have entitled the assured to recover such expense separately under a "sue and labour" clause.<sup>3</sup> In a recent case (*Symington & Co. v. Union Insurance Society of Canton, Ltd.*, [1928] 34 Com. Cas. 23 C.A.) the underwriters were held liable for (i) damage to cargo by water used to prevent fire spreading; for (ii) part of cargo thrown from the quay into the water for the same purpose; on the ground that the liability was covered by the general words as either a loss by fire or at least analogous to such a loss, and that the action of the fire brigade was not a "restraint" within the "f.o. and s." clause; see p. 168, *post*.

<sup>1</sup> And see Halsbury, 2nd Ed., p. 300 n. (g), and cases cited.

<sup>2</sup> See discussion of this case in *Kacianoff v. China Traders Ins. Co.*, [1914] 3 K.B. 1121 C.A.

<sup>3</sup> As to which see p. 160, *post*.

Explosion of a boiler or of a steam-pipe causing damage, though arising, as every such event must, from over-heating or at least from heat, is not a loss caused by fire. (*Thames and Mersey Marine Insurance Co. v. Hamilton (supra)*.)

In *Busk v. Royal Exchange, etc.*, [1818] 2 B. & Ald. 73, the insurer was held liable for a fire attributable to negligence. It is well-settled that fire directly referable to *inherent vice* in the thing insured is not covered by the term "fire", as the same is to be understood in this clause. The doctrine of *inherent vice* in this context, however, presents many difficulties in its application, and is rendered all the more difficult by the way in which science herself has wavered over the theory of so-called "spontaneous" combustion.<sup>1</sup>

*Pirates*.—In the English Code<sup>2</sup> this word is not defined; but by a rule of construction the word, as used in this clause, will be held to include a ship's passengers who mutiny, and rioters from the land who take upon themselves to attack the ship. An instance of the last-named kind of event, which was deemed to be within the concept of piracy for the purposes of this particular risk, was a mutiny of coolies in China resulting in damage to the subject-matter of insurance. (*Kleinwort v. Shepherd*, [1859] 1 E. & E. 447.) It was pointed out by Kennedy, L.J., in *Republic of Bolivia v. Indemnity Mutual Marine Ass. Co.*, [1909] 1 K.B. 735 C.A., that the word "piracy" has different meanings according to the context;<sup>3</sup> and in that case an attack upon the ship by local revolutionaries was held to be civil commotion, and not piracy. Said the Lord Justice "Piracy is a word which is open to various shades of meaning. Even as a legal term, strictly used, it may be used differently when looked at from the point of view of the international lawyer or from the point of view of the criminal lawyer . . ." and, he went on with special reference to the matters before him, "Piracy has, I think, been regarded by Pickford, J., from the right point of view, as a word which has to be looked at in the sense in which it would be construed in a business document of this kind by businessmen." As illustrations of the truth of this *dictum* the student may note the following authoritative definitions:—

(1) "Piracy may be said to consist in acts of violence done upon the ocean or upon unappropriated lands or within the territory of a State, through descent from the sea by a body of men acting independently of any politically organised society."<sup>4</sup>

(2) "Piracy, by the law of nations, is taking a ship on the high seas or within the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English County."<sup>5</sup>

<sup>1</sup> Anyhow, in *Greenfields, Cowie & Co. v. Stephens & Sons*, [1908] A.C. 431, 435, the House of Lords held that damage caused by water which was employed to put out a fire arising from "spontaneous combustion" of coal is to be treated as general average.

<sup>2</sup> Schedule 1, rule 8.

<sup>3</sup> For some ten definitions of piracy, see *Chalmers' Marine Insurance Act*, 4th Ed., pp. 164-166.

<sup>4</sup> Hall's *International Law*, 3rd Ed. (1902), p. 257.

<sup>5</sup> *Stephen's Digest of Criminal Law*, 3rd Ed., Art. 104. But that learned commentator regarded it as doubtful whether persons cruising in armed vessels with intent to commit piracies are to be regarded as pirates or not.

(3) "Piracy is forcible robbery at sea, whether committed by marauders from outside the ship or by mariners or passengers within it. The essential element is that they 'violently dispossess the Master, and afterwards carry away the ship itself or any of the goods with felonious intent'." <sup>1</sup>

From the foregoing definitions it is to be collected that there may be piracy *jure gentium*,<sup>2</sup> piracy in the eye of the criminal law, and piracy within the meaning of a commercial document. If again the foregoing definitions be studied in rather more detail, we find that for the international lawyer, though the pirate may be inhabiting a ship, his acts of piracy may extend to the shore. For the criminal lawyer the rogues may come from the shore and enter the ship with apparent innocence as workmen or passengers, and finally become pirates when they take upon themselves to dispossess the Master of the ship of his control over her, or to deprive those who own the ship or the merchandise she carries of that which is theirs. For the commercial man piracy may mean all this, or something a little less or a little different, and it is for that reason that, for the purposes of a marine insurance policy, judges and commentators are alike reluctant to attempt any exhaustive definition. It may, however, at least be said that there can be no piracy without the element of forcible deprivation, nor any without a ship for its background.

The topic of piracy cannot be left without observing that there is piracy by statute in most of the civilized countries of the world. Thus the slave trade is deemed piratical both in England and in the United States. In France, persons navigating in time of peace with irregular ship's documents are deemed pirates without the commission of any act of violence on their part.

The Indian Penal Code makes robbery with violence punishable under section 392. By section 4 of that Code, any native Indian subject may be punished for a robbery where the same has taken place "without and beyond British India". While, then, piracy, if committed by a native Indian subject of the King upon a ship, whether inside or outside Indian territorial waters, would be punishable as "robbery", there is actually no Indian statute which expressly takes cognizance of piracy, as such.

*Rovers.*—The English Code condescends to no definition of a rover, for the very good reason that the books contain none. It seems evident, however, that an adventurer of any sort who carries out a definite act of spoliation against the ship or craft, or its appurtenances, or the goods she carries, will be a rover as well as a thief, albeit he may not be a professional thief.

In the past the word usually connoted a man—often well enough born <sup>3</sup>—who "roved" the seas in search of lucrative adventure,<sup>4</sup> but

<sup>1</sup> Carver's Carriage by Sea, Art. 94, citing *Attorney-General for Hongkong v. Kwok-a-Sing*, [1873] 5 P.C. at p. 199. In this case it was held incidentally that piracy was triable in any Court.

<sup>2</sup> A case directly in point is the recent case of *Re Piracy Jure Gentium*, [1934] A.C. 596, where it was held that persons may be pirates, according to international law, if they commit acts which are otherwise piratical with a view to robbery, though the robbery intended may itself be frustrated; and it would seem that this proposition might be applicable to a marine policy. See *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co., etc.* (*supra*).

<sup>3</sup> Some may remember the English ballad, at one time much in vogue in the public schools of England, which contained the lines:—

"Sir Ralph the Rover tore his hair.

He cursed himself in his despair."

<sup>4</sup> Often enough looking for supposedly "buried treasure", or merely in expectation of discovering uncharted islands or unknown seas.

whose main object was not necessarily piracy, nor even the acquisition of gain by any other dishonest means, but who nevertheless might not scruple to take by force, if the occasion offered, anything which his personal needs demanded.

The object of including the word *Rovers* in a clause containing such words as *Pirates* and *Thieves* was simply to be sure of covering acts done by persons who might otherwise escape some highly technical definition of a pirate or a thief. For example, in *Harford v. Maynard*, [1785] 1 Park's Marine Insurance, 8th Ed., p. 36, robbery with violence committed by strangers was held not a piracy, and its result as a loss "by rovers or thieves" under the policy. Where shipwrecked goods, cast upon the shore, were plundered by wreckers there, the resulting loss was held to be one by "perils of the seas". (*Bondrett v. Hentigg*, *supra*.)

*Assailing Thieves*.—The ordinary Lloyd's policy is content with the substantive "thieves", quite unqualified. The epithet appearing in the clause under examination is borrowed from American draughtsmanship.

In the United States, where the law of marine insurance is an adaptation of the corresponding law of England, the controversies over the word "thieves", which were early features of the relative English litigation, tended to become even more acute. The history of the matter may be thus summarized. It was never the intention of underwriters to cover losses from every kind of theft, however clearly the perpetrator of the act occasioning the loss might come within the Common Law notion of one who commits larceny, and so, in common parlance, would be styled a "thief". The transit of many kinds of goods by sea, and the unprotected nature of much which might be classed as ship's tackle, ship's apparel or ship's furniture, provided abundant occasions for petty acts of spoliation on the part of persons who in some way or other had opportunities for theft. It was not to meet circumstances so inevitable that the early insurers were prepared to risk their money. For against perils of this minor class it were almost impossible to provide. On the other hand, if proper watch and ward be kept over merchandise in transit; and if holds, chests and the like be properly secured; if a ship be properly manned, and her crew, where the voyage may expose the ship to danger of attack, go properly armed; acts of robbery with violence might well be covered by insurance without the risk being regarded as too hazardous to afford a reasonable business proposition. Accordingly, the courts from early times construed the word "thieves" in this clause as meaning persons who carried out their depredation with violence, not necessarily openly—in the sense of making an armed attack by day-light or torch-light—but by the use of force, in the sense of breaking down structural or personal opposition. Thus, while everything which would be robbery under arms, or robbery with violence, or robbery accompanied by threats if the crime were committed on shore, would equally be the work of "thieves" within the meaning of this term and clause, when committed upon a ship or other craft whether afloat, or in dry dock, or in respect of goods covered by the policy, at any time during the currency of the risk; so, under a "warehouse to warehouse" clause, the breaking open the doors of an unattended warehouse and stealing the goods, will be the work of "thieves" within the meaning of that clause. There is some authority, moreover, for the suggestion that where a policy contains a "warehouse to warehouse" clause the doctrine that only theft by violence is covered will no longer apply. (*Fabrique de Produits Chimiques v. Large*, [1923] 1 K.B. 203.)

Accordingly, American draughtsmen conceived that they had avoided the difficulties suggested in the early decisions by attempting to express the idea of violence as an essential concomitant of the thefts to be covered, by using the word "assailing" as qualifying the word "thieves".

It is submitted that in so doing they have discovered a word which fulfils the requirements of the law as to this matter; for the word "assail" comprehends not only the notion of attack, but also that of mastering or overcoming a difficulty, and would thus appear to cover not merely robbery *vi et armis*, but also a breaking and entering of a hold, or the cutting of a way through a bulk-head, so as to steal stores or cargo.

In the result, if an assured wishes to obtain cover for thieving of any other kind, *e.g.*, such petty thieving as is known by the old English word "pilferage",<sup>1</sup> he must obtain a special clause aptly worded, for he will get no protection under the term "assailing thieves" as in the clause under examination.

*Jettisons.*—The nature of Jettison has already been described in an earlier part of this chapter.<sup>2</sup> The loss occasioned by jettisoning anything appertaining to the ship, or a part of the cargo, is a "general average" loss. The same principle is applied to freight which the shipowner would have received for the goods had they not been jettisoned. Accordingly, in such a case and where freight is insured, the lost freight must be made good to him by a "general average contribution". So, damage inevitably caused to the ship or to other goods by an act of jettison gives, on that ground, a claim to general contribution. Thus, should valuable goods be brought up on deck so that less valuable goods stowed lower down in the hold may be got at and jettisoned, any consequent damage to the more valuable goods (even the total loss of them by their being, in the resulting conditions, themselves washed overboard) sounds as a general average loss. A very early case decided that if goods without any fraudulent intent be voluntarily ceded to pirates by way of composition with them, their loss in such circumstances sounds as a general average loss, on the ground that in such case the goods are as much sacrificed for the general safety as they would have been had they been jettisoned. (*Hicks v. Palington*, [1590] Moore 297.)

It should be noted that the property in goods jettisoned remains in the legal owner. So if anything jettisoned be recovered from the sea the rightful owner may make claim to them and may maintain an action to recover them. But he must pay to the salvor the expenses incidental to the salvage: the salvor being regarded as one who has a *lien* upon them for such expenses as he may have been put to, which equity would not disregard.

*Barratry, etc.*—The nature of barratry has been fully described in an earlier part of this chapter to which therefore the reader is referred.<sup>3</sup>

*All other perils, losses and misfortunes, etc.*—Here the law strictly applies what is termed the *ejusdem generis* rule: that is to say that what is contemplated are happenings *akin* to those already provided for and mentioned in the earlier part of the clause. (*Thames & Mersey Insurance Co. v. Hamilton*, *supra*.)<sup>4</sup>

We must not leave the topic of those general risks which a clause drawn in the time-honoured way comprehends, without noticing that in the particular policy under examination there will be found elsewhere,

<sup>1</sup> As to which, see p. 112, *ante*.

<sup>2</sup> Page 111, *ante*.

<sup>3</sup> Page 106, *ante*.

<sup>4</sup> The English Code recognizes this principle in Schedule I, rule 12.

and among what are technically styled "Warranties", a clause commonly styled the "F.C. and S. Clause",<sup>1</sup> whereby the underwriter is exempted from any liability in respect of capture and seizure of the vessel in circumstances which are acceptable under the general words of a Lloyd's policy, to the details of which the reader's attention will later be drawn by the words italicized by the author at page 168, *post*. Accordingly, the true nature of these perils thus accepted in the ordinary Lloyd's policy and expressly refused by underwriters who have inserted an "F.C. and S. Clause" will be more appropriately discussed when the detail of the last-mentioned clause comes up for examination.<sup>2</sup>

*All risks.*—Sometimes a policy purports to cover what is therein styled "all risks" and it may be well to consider what in reality is effected by such a term in a policy of marine insurance. In *Schloss v. Stevens*, [1906] 2 K.B. 665, the term read "all risks by land or water to warehouse". And, again, "all risks from sheep's back by land or water to warehouse" has been met with. Such phrases are high sounding and raise high hopes. But to the risks so undertaken there must, it seems, be certain necessary limits. Referring to the phrase "all risks" in marine policies, "the expression," according to Lord Sumner, "does not cover inherent vice or mere wear and tear, or British capture. It covers a risk not a certainty. It is something which happens to the subject-matter from without, not the natural behaviour of the subject-matter in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally, the description 'all risks' does not alter the general law. Only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils." (*British and Foreign Marine Insurance Co. v. Gaunt*, [1921] 26 Com. Cas. 247, 259; [1921] 2 A.C. 41, 57 H.L.)

*And in case of any loss or Misfortune, it shall be lawful for the INSURED, his or their Factors, Servants or Assigns to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said subject-matter of this INSURANCE or any part thereof, without prejudice to this INSURANCE, the charges whereof the said Company shall bear in proportion as the sum hereby insured is to the whole amount at risk.*

This clause has come to be known as the "Sueing and Labouring" Clause.

The clause embodies a distinct engagement, supplementary to the main contract, and thus adds yet another integer to the bundle of separate agreements which is the shape of the modern marine policy.

The object of this particular agreement is to provide an incentive to the assured and all his servants and agents having any control over the nature of the venture and the actual working of the ship as well as the handling of the merchandise insured, to be active and diligent in taking every reasonable step either to avert a peril insured against, or, on the happening of any contemplated danger, to minimize the loss which the event might otherwise occasion. The incentive consists in an express recognition on the part of the insurers that everything so done

<sup>1</sup> Formerly styled W.F.C. & S. for "Warranted free of capture and seizure".

<sup>2</sup> As to which, see p. 163, *post*.

with the *bona fide* intention of averting or minimising loss must not be permitted to prejudice the assured's ordinary rights under the policy, and by an express undertaking on the part of the insurer to bear a share of the expenses incurred, such share to be calculated in proportion "as the sum hereby insured is to the whole amount at risk". As was said in *Cunard Steamship Co. v. Marten* (*supra*) at p. 629, "whilst the underwriters are to bear their share of any sueing and labouring expenses, they are to bear such share only in the proportion of the amount underwritten to the whole value of the property or interest insured".

It is important to remember that what is encouraged, and therefore what is the subject of agreement between the parties under this clause, is the averting or minimising of a danger contemplated by the policy read as a whole. If the calamity which occurs and occasions loss be something of another nature, and thus not covered by the policy, no charges incurred by the assured or his servants in mitigating the effect of the catastrophe will be recoverable from the underwriters under this clause.

It is of further importance to recollect that it follows from the separate nature of the agreement embodied in this clause that what is recoverable under it from the insurers are sums of money additional to what may be recoverable in respect of loss and damage as such. It is possible by forgetting this circumstance to make a claim under a wrong head. Thus, whilst services in the nature of salvage, and involving particular expenditure may rightfully be claimed under this clause, charges in respect of Maritime Salvage, properly so-called, are not incurred "by the assured, his servants, agents or factors", but fall within the category of a peril contemplated by the policy. Thus, too, anything falling within the category of general average loss is outside the scope of this additional agreement, being recoverable under the main terms of the policy itself. Again, suppose that the policy be one against total loss only, and the danger apprehended be demonstrably one capable merely of producing a partial loss. Expenses incurred to prevent such partial loss would not be recoverable under a "sue and labour" clause. (*Great Indian Peninsula Rly. Co. v. Saunders*, [1862] 2 B. & S. 266.) The student should note that the test of whether certain expenses incurred may or may not be recovered under the Sueing and Labouring clause is not the right to claim for an actual loss; for it has been held that where goods have been insured free of average or free of average under 5 per cent, and a danger is averted (though some loss was occasioned, which, but for the action of the assured's servants, might well have resulted in a total loss or at any rate a loss exceeding 5 per cent), the expenses incurred are recoverable under the sue and labour clause, although the actual loss by the terms of the general policy is so small as not to entitle the assured to indemnification therefor. (*Kidston v. Empire Marine Insurance Co.*, [1866] 1 C.P. 535, 524-544.)

It is suggested that the effect of the clause may be modified or even excluded by agreement, for instance by inserting a term "no S/C" meaning "no salvage charges". See *Western Ass. Corp'n. v. Poole*, [1903] 1 K.B. 384, where evidence was admitted to show that "no salvage charges" (so expressed) meant "no sue and labour charges". The reader will remember, from what has been already pointed out in an earlier part of this chapter, that printed clauses in marine policies are frequently left where they are and unamended, though some other terms inconsistent with them have been inserted in writing or by an equivalent method, e.g., a rubber stamp. In the particular instance if a sue and

labour clause were to be found in a printed policy, neither struck out nor amended, and such a term as "no S/C" were to be found in some other uncovered space upon the face of the instrument, the policy would be read so as to make the term so inserted over-ride the printed text.

The following cases will exemplify the more general operation of this clause:—

*Kidston v. Empire Insurance Co.*, [1866] 1 C.P. 535; 2 C.P. 357 Ex. Ch. Insurance was on chartered freight, warranted free from particular average. The ship in consequence of sea-damage became a constructive total loss,<sup>1</sup> but the cargo was landed and sent on in another ship. The expenses of landing, warehousing and reloading the cargo can be recovered as particular charges under the sue and labour clause.

*Lee v. Southern Insurance Co.*, [1870] 5 C.P. 397. Policy on freight. A ship bound for L. is stranded at P. The cargo is landed and, in order to earn freight, is sent on by rail to L. at a cost of £200. It might have been sent on by ship at a cost of £70. The insurer on freight is liable for £70 only, under the sue and labour clause.

*Dixon v. Whitworth*, [1879] 4 C.P.D. 371, 377, 378. Policy for £1,000 on ship and cargo valued at £4,000. Expenses are incurred under sue and labour clause to the extent of £2,000. The insurer is liable to contribute £500.<sup>2</sup>

*The Pomeranian*, [1895] P. 349. Live cattle are insured against all risks. The ship, owing to sea perils, is detained in a port of refuge for some weeks. The cost of extra fodder supplied to the cattle during the detention is recoverable under the sue and labour clause.

*Wilson Bros. Bobbin Co. v. Green*, [1916] 1 K.B. 860; 22 Com. Cas. 185, 191. Policy on goods against war risks. The ship is stopped by a German cruiser, and has to put into a Norwegian port, where storage and re-shipment expenses are incurred. These expenses are recoverable under the sue and labour clause.

*Aitchison v. Lohre*, [1879] 4 A.C. 755. A ship valued at £2,600 is insured with D. for £1,200. After encountering very heavy weather the ship is rescued by a steamer with which no contract is made, and which afterwards obtains an award of £800 for salvage.<sup>3</sup> The owner, instead of abandoning, elects to repair the ship at a cost of £2,600. The insurer is only liable for £1,200. He is not liable under the sue and labour clause for any additional sum for salvage charges, for the salving steamer is not the "factor, servant, or assign" of the assured.

*Uzielli v. Boston Marine Insurance Co.*, [1884] 15 Q.B.D. 11 C.A. A ship is insured by A., an underwriter, who re-insures with B., who again re-insures with C. for £100. The ship becomes a constructive total loss. A. settles with the original assured, and then at great expense refloats the ship and sells her. His expenses amount to 112 per cent on the insured value. If B. pays A. he can only recover £100 from C., for A., the first insurer, is not the factor, servant, or assign of B. within the meaning of the sue and labour clause.<sup>4</sup>

*Cunard Steamship Co. v. Marten*, [1902] (*ante*); affirmed [1903] 2 K.B. 511, C.A. Policy effected by ship-owner "to cover ship-owner's

<sup>1</sup> As to the meaning of this phrase, see p. 196, *post*.

<sup>2</sup> The case is overruled only so far as it decided that salvage expenses were recoverable under the clause. See, too, *Cunard Steamship Co. v. Marten* (*supra*).

<sup>3</sup> As to salvage generally, see p. 210, *post*.

<sup>4</sup> Distinguished and discussed on *Western Ass. Co. v. Pools*, [1903] 1 K.B. 376, 384.

liability of any kind to owners of mules and cargo up to £20,000 owing to the omission of the negligence clause in the contract". The mules are worth £40,000. The ship is stranded, and expenses are incurred in landing some of the mules which are saved. The sue and labour clause does not apply to a policy in this form, and the expenses so incurred cannot be recovered under the clause.

*Crouan v. Stanier*, [1903] 1 K.B. 87. A ship insured against total loss is stranded and abandoned. The insurers employ a firm of ship repairers, who succeed in getting her off and saving her, and the assured fails in his claim for a total loss. The insurers cannot counter-claim under the sue and labour clause, or otherwise, for the expenses of salving the ship.<sup>1</sup>

*Xenos v. Fox*, [1869] 4 C.P. 665, Ex. Ch. Policy on ship containing a collision clause. The assured is sued for running-down another ship, and incurs costs in defending the action. These costs are not recoverable from the insurer under the sue and labour clause.

The English Code<sup>2</sup> imposes upon the assured and his agents what it describes as a duty "in all cases to take such measures as may be reasonable for the purpose of averting or minimising a loss". This subsection has given rise to a great deal of judicial controversy<sup>3</sup> and in terms would, if followed, impose a duty which might often involve an assured in irrecoverable expenses under the accepted doctrines concerning the effect of the "sue and labour" clause. There being no corresponding rule of law in India, it is conceived that the courts in this country will limit the liability of the assured in the matter of protective services to what would properly fall within the category of services the expenses for which he might claim some recompense under this clause.

*And the acts of the Insured or of this Company in recovering, saving or preserving the property insured shall not be considered a Waiver or acceptance of Abandonment.*

This is what is known as the "waiver" clause, which is of comparatively recent origin in this form, dating, as it does, from 1874 so far as Lloyd's policies be concerned. It is complementary to the "sue and labour" clause which precedes it. As its phrasing implies, it has for its object the meeting of any plea that the work done towards prevention or mitigation of damage has prejudiced the claims of either party in respect of such damage. Its insertion in a modern policy is *ex majori cautela*,<sup>4</sup> for, in fact, as far back as 1869 (*Stringer v. English etc. Insurance Co.*, 4 Q.B. 676, 686), a Court had expressed the opinion that such a clause was superfluous. It is, however, useful in safeguarding the legal position of both parties when either of them may have striven to avert a loss, and the assured has given notice of abandonment and expressly claimed for a constructive total loss.

*And it is declared and agreed that Corn Fish Salt Fruit Flour and Seed shall be and are warranted free from average unless general or the Ship be stranded and that Sugar Tobacco Hemp Flax Hides and Skins shall be*

<sup>1</sup> Distinguishing *The Pickwick*, [1852] 16 Jur. 669.

<sup>2</sup> See Halsbury, 2nd Ed., Vol. 18, Art. 471 n (c).

<sup>3</sup> "Out of greater caution."

<sup>4</sup> Sec. 78 (4).

*and are warranted free from average under Five per centum that all other Goods also the Ship and Freight shall be and are warranted free from average under Three per centum unless general or the Ship be stranded.*

This part of the policy is traditionally known as the "Memorandum". In a standard form of Lloyd's policy it often follows the signatures of the underwriters, and is preceded by the letters "N.B." As an addition to the older form it dates from the year 1749.

The student, to understand it, must have gained a clear conception of the meaning of the two expressions "general" and "particular" average, which have been defined in an earlier part of this chapter.<sup>1</sup> He must also have in mind the meaning of the expression "free from average unless general", namely, as signifying that the underwriters are not accepting anything but a general average loss except (in the particular instance) in the case of the stranding of the vessel when a particular average loss will be entertained. So, in effect, the underwriter is exempted from liability for anything less than a total loss unless the ship be stranded, but that for general average losses he remains liable in any event. So, too, unless the ship be stranded he is not liable for particular charges unless they be such as may be separately claimed under the "sue and labour" clause.

Accordingly it becomes necessary to see what amounts to a "stranding" of a vessel for the purpose of letting in particular average claims.

A "strand" primarily means a strip of land, and commonly but not always refers to that strip, bordered by the sea, which is more frequently known as the "shore". In nautical language a vessel is considered stranded when, although much of her may be visible above the level of the sea, her weight is taken by land rather than by water. Then as mariners say, "she is aground". The student of marine insurance must, however, be prepared for a rather specialised interpretation of the word "stranded" for the purpose of casting liability upon the shoulders of underwriters with regard to this part of the Memorandum. In *Wells v. Hopwood*, [1832] 3 B. & Ad. 20, 34, Lord Tenterden was heard to say "Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbour upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as stranding within the sense of the memorandum. But where the ground is taken under any ordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered as stranding within the meaning of the memorandum. According to the construction that has long been put upon the memorandum, the words 'unless general or the ship be stranded' are to be considered as an exception out of the exception as to the amount of the average or partial loss provided for by the memorandum, and consequently to leave the matter at large, according to the contents of the policy."

No comprehensive definition of stranding as contemplated by the memorandum can be attempted. It is, indeed, a question of fact in each case, to be determined with the prime circumstance always in

<sup>1</sup> See pp. 108 *et seq.*, *ante*.

mind that the risks contemplated by the policy are those arising from events of an extraordinary or fortuitous nature.<sup>1</sup>

In the policy under examination there must be read into the memorandum the terms of a later clause which is in these words:—

*"Grounding in the Suez Canal, or in the Manchester Ship Canal or its connections, or in the River Mersey (above Rock Ferry Slip) not to be considered a Stranding under this policy unless damage to the Interest hereby insured be proved to have directly resulted therefrom."*

It remains to note that the word "average" throughout the memorandum is to be taken to mean "general average". By the terms of a later clause in the policy under examination general average is made payable "*according to foreign statement or York-Antwerp Rules if in accordance with Contract of Affreightment*". The reader is here to be reminded of what has been said earlier in this chapter<sup>2</sup> as to the effect of attracting foreign rules for the adjustment of average or the more or less international rules known as the York-Antwerp Rules.<sup>3</sup> The attraction either of the foreign statement or the last-mentioned rules is, however, made dependent upon such attraction not being contrary to or inconsistent with the terms of a charterparty or bills of lading or of any other documents from which the terms of the Contract of Affreightment are to be gathered.

One further clause touching the same matter has to be mentioned as occurring in the policy under examination. It is in these words:—

*"The adjustment of all Average Losses and other matters relating to this Insurance shall, in like manner, be made by the said Agents of the Company agreeable to the tenor of this policy, and according to the established practice there in such cases."*

The only phrase in the foregoing clause to which it is desirable to call the student's attention are the words "*agreeable to the tenor of this policy and according to the established practice there in such cases*". These words attract any adjustment according to foreign statement or York-Antwerp Rules where the same is permissible under the Contract of Affreightment, and also make room for local usage where the same may have a material bearing upon the working-out of the adjustment in terms of money.

*And further the said TRITON INSURANCE COMPANY, LIMITED, hereby covenants, promises, and agrees in case of Loss happening (which God forbid!) to satisfy and pay in Calcutta the sum of money hereby INSURED, at the expiration of thirty days, after the first proper Notice of the Loss is given to Messrs. Jardine Skinner & Co. Managing Agents for the Company, in Calcutta at the current rate of exchange for Bank Bills on demand without abatement.*

The result of making payment obligatory in Calcutta under this term of the policy is to afford a right to sue for such payment in the

<sup>1</sup> It may be helpful to the student to point out that a slight grounding of a vessel whereby she was not prevented from floating off within a minute or two is not a stranding; nor is sinking into deep water so that the vessel lies on the bottom. In *M'Dougle v. Royal Exchange Ass. Co.*, [1816] 4 Camp. 284, Lord Ellenborough said of the numerous decisions upon the meaning of the word "stranded" that they displayed "a curiosity not at all creditable to the law". The variety to which he alluded is succinctly demonstrated in Arnould, 11th Ed., §§ 888-890.

<sup>2</sup> See p. 105, ante.

<sup>3</sup> These rules are printed as Appendix V to this treatise.

High Court of the Presidency.<sup>1</sup> The effect of this is to convey to the assured in the particular instance a right to have the terms of the contract determined according to the *lex loci solutionis* which from the terms of the clause would be the law of British India.<sup>2</sup>

Apart altogether from such a right, conveyed as it is by the express terms of this particular contract of insurance, such a contract, if entered into after the date when the Insurance Act, 1938, came into force would come within the purview of one of the very few provisions of that statute which has any effect upon the law relating to marine insurance in this country. The relative section is section 46, to which allusion has been made in much earlier chapters of this treatise.<sup>3</sup> By it any "holder" of a policy of insurance issued by an insurer in respect of insurance business transacted in British India after the commencement of the Act acquires the right, *notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto*, both to receive payment in British India of any sum secured thereby, and to sue for any relief in respect of the policy in any Court of competent jurisdiction in British India. Where a holder chooses to avail himself of the last-named statutory option, all questions of law arising in connection with the policy are by the terms of the section to be determined according to the law in force in British India.

Thus, in the case contemplated, although every term of the policy may expressly attract a foreign law, it would seem obligatory on the Court to apply the law of British India only. In consequence it would seem that average adjustment would have to be carried out in accordance with Indian rules in that matter. Assuming that the policy under examination had been issued after the Insurance Act, 1938, had come into force, the rules applicable would doubtless be the Calcutta Rules (if any) read with any proveable usage of the port. The inelastic terms of this section may well give rise to difficulties where the loss is occasioned in other waters and a foreign statement is necessary. So, too, unless local Indian rules be as good as the York-Antwerp Rules and as generally acceptable to foreign commercial opinion, a good deal of marine insurance which might be effected in India either through Indian-owned concerns or with companies at any rate having branches in India may be attracted elsewhere.

*Held covered in case of deviation or change of voyage at a premium to be arranged provided notice be given on receipt of advices.*

Here we have a specimen of a "held covered" clause. By it the assured does not lose his rights under the general terms of the policy by reason of a deviation or even by a change of the voyage itself, provided that he succeeds after due and proper notice in arriving at an agreed premium to cover the altered risk.

*In no case is the Company liable for deck cargo unless specially allowed.*

The risk attending deck cargo is obvious. The words "specially allowed" are perhaps not happy, since they leave it uncertain whether

<sup>1</sup> This Court which formerly was entitled "The Supreme Court of Judicature" now has the later statutory designation "The High Court of Judicature at Fort William in Bengal".

<sup>2</sup> See the discussion at pp. 137-140, *ante*.

<sup>3</sup> See p. 16, *ante*.

the word "allowed" would cover what may be permitted by usage. Probably all that is intended is to attract the terms of some special subsidiary contract in respect of deck cargo into which the parties intend to enter and which might be stamped or written on the body of the instrument, so as to override this general stipulation, or might be embodied in a slip or made a matter of endorsement.

**The Warranties.**—In the policy under examination the stipulations figuring in the main body of the instrument end with a clause beginning with the three words "warranted free of". In the margin of the instrument are a number of other clauses, for the most part printed in smaller type, which all begin with the word "warranted". The reader is thus introduced to that class of stipulation which in a policy of marine insurance is known as a "warranty".

The place of warranties in the law of contract in British India has already been the subject of discussion in Chapter II of this treatise.<sup>1</sup> In the law relating to marine insurance a warranty may be either express or implied. Nor does that statement wholly exhaust the matter, since, as already pointed out in the earlier passage alluded to above, in marine insurance, "any statement of fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, *prima facie*, at least, compliance with that warranty is a condition precedent to the attaching of the risk."<sup>2</sup>

To use popular language, the meaning to be attached to the words "warranted free from" or "warranted free of" which commonly figure at the head of this particular kind of stipulation is that the party who insures pledges himself that the generality of the words expressing, in the main body of the policy, the risks which the insurer undertakes, shall be limited and cut down by what is stated in each and every clause which begins with the word "warranted". In other words, each such warranty expresses an "exception" to what would otherwise be apparently included in the risks for which the underwriters make themselves liable. Another class of "warranty" is so worded as to assert the truth of some fact as a condition of the contract.

In the English Code<sup>3</sup>—making use, as it must do, of technical language—an express warranty may be either a "promissory warranty" or a mere "exception". In the former class the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or he affirms or negatives the existence of a particular state of facts. Thus what is imported into the contract by this kind of stipulation is a *condition* which must be exactly complied with, whether it be material to the risk or not. It follows that in accordance with the law of contract already discussed earlier in this treatise,<sup>4</sup> non-compliance with such a condition is styled a "breach of warranty" and its effect is that, unless the policy otherwise expressly provides, the underwriter is discharged from his liability as and from the date of the breach,<sup>5</sup> though not in respect of liability incurred before that date. (*Pawson v. Watson*, [1778] 2 Cowp. 785; *De Hahn v. Hartley*, [1786] 1 Term. R. 343; *Blackhurst v. Cockell*, [1789] 3 Term. R. 360.) A mere intention to break

<sup>1</sup> Pages 38-40, *ante*.

<sup>2</sup> Sec. 33.

<sup>3</sup> *Thomson v. Weems*, [1884] 9 A.C. 671.

<sup>4</sup> Pages 38-41, *ante*.

<sup>5</sup> This does not mean that the policy is "void"; it only means that it is "voidable". Thus the underwriter may, at his option, "avoid" the policy or waive the breach.

a warranty is, of course, no breach. (*Simpson S. S. Co. v. Premier Underwriting Association, Ltd.*, [1905] 10 Com. Cas. 198.) In the concept of a warranty as essentially what lawyers call a condition it may either be classified as a condition precedent or a condition subsequent. (*Union Insurance Society of Canton v. Wills & Co.*, [1916] 1 A.C. 281.)

**Particular Warranties Examined.**—The individual warranties which figure in the policy under examination may now be set out *seriatim* and commented upon as follows:—

*"Warranted free of all liability for loss arising from leakage or breakage of or to any liquid or liquid package."*

This is a clause sometimes inserted to guard against petty claims arising from circumstances never easy to prove or disprove as directly caused by a peril of the seas.

1. *Warranted free of capture seizure arrest restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not, civil war, revolution rebellion insurrection or civil strife arising therefrom or piracy.*

When as the result of the world war of 1914–1918 risks phrased in the traditional marine policy as liabilities regularly undertaken and expressed by the words "*surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people of what nation condition or quality soever*" had ceased to be rare and had become, on the contrary, common hazards, not only were these risks left out of the list of perils insured against but the perils themselves were regularly made the subject of an express exception in the form of a warranty which came to be known as the "F.C. & S. Clause".<sup>1</sup> From the trend of the earlier cases in which the phrase "consequences of" was relied upon, it was plainly intended by the original draughtsmen to include something beyond the proximate cause. But the House of Lords has construed the word "consequence" as referring to the *immediate* and *not* to the *remote* causes of a loss. (*Anderson v. Marten*, [1908] A.C. 334, 339.)

Some insurers after the word "*princes*" or "*people*" commonly insert the word "*usurpers*" in such a clause. A policy containing an F.C. & S. clause does not cover war risks. Thus, as a matter of history, the acceptance of war risks or of any peril falling within an F.C. and S. clause must be made the subject of separate insurance.

In *Johnston v. Hogg*, [1883] 10 Q.B.D. 432, 435, Cave, J., rather deprecated the attempts of text-book writers to give distinct and different meanings to such words as "capture", "seizure", "arrest", "detention" and "restraint", regarding it as wise to rely for the particular meaning "not on any general rule, but on the context and circumstances of the case". Nonetheless, the courts themselves have treated the word "seizure" as of wider significance than "capture", as for instance, by holding that the former will include the taking or arresting of a ship in peace time at the hands of some revenue or sanitary authority of a foreign state; while "capture" has come to mean the taking by a belligerent as prize of war, i.e., with intent to deprive the owner not merely of temporary possession but of all property in the subject of the seizure. (*Cory v. Burr*,

<sup>1</sup> Standing for "free of capture and seizure, etc."

[1883] 8 A.C. 393; *Miller v. Law Accident Insurance Co.*, [1903] 1 K.B. 712; *St. Paul Fire & Marine Insurance Co. v. Morice*, [1906] 11 Com. Cas. 153; *Anderson v. Marten*, [1908] A.C. 334.) But a voyage abandoned from fear of capture does not entitle the holder of a marine policy to recover as for a loss by "capture". (*Kacianoff v. China Traders Insurance Co.*, [1914] 3 K.B. 1121; *Becker, Gray and Co. v. London Assurance Corp.*, [1918] A.C. 101.)

2. *Warranted free of loss or damage caused by strikers locked-out workmen or persons taking part in labour disturbances riots or civil commotions.*<sup>1</sup>

This warranty involves a number of definitions, e.g., of a "striker" and a "locked-out workman": which in turn must depend upon a definition of a "strike" and a "lock-out". Prior to the more recent legislation concerning trade disputes, and those modern methods of enforcing the views of one side or the other which are unknown to the law of contract, there was, in the language of Kelly, C. B., in *King v. Parker*, [1876] 34 L.T. 889, no authority giving "a legal definition of the word 'Strike'". The court in *Farrer v. Close*, [1869] L.R. 4 Q.B. 612, held a "strike", properly defined, to be "a simultaneous cessation of work on the part of the workmen". But such a definition would obviously cover any common cessation however motivated, and consequently it has not found favour either with judges or with the draughtsmen of statutes enacted for the purpose of dealing with events of that character. Thus we have it that a mere refusal to work because an infectious disease is prevalent, or the weather is too hot or too wet, or such like excuse, is not a "strike" such as would provide a party with a valid excuse for a delay in fulfilling his contract. (*Stephens v. Harris*, [1888] 57 L.J. Q.B. 203.) In *Richardsons v. Samuel*, [1898] 77 L.T. 479, it was held that the word "lock-out" like the word "strike" in its ordinary meaning, applies to labour disputes. But in *Williams Bros. Ltd. v. Naamlooze Vennootschap Berghuys Kolenhandel*, [1917] 86 L.J. K.B. 334, a concerted agreement by a crew refusing to sail, on the ground that they would be exposed to the danger of being sunk by German war vessels, is a "strike" within the meaning of the term in a charterparty. It may be taken that for the purposes of marine insurance, the courts treat "warranties" appearing in a policy as governed by the same principles and rules of interpretation as are applied to "exceptions" in shipping contracts. So, where, as here, the warranty seeks to except from liability, loss or damage caused by strikers and locked-out workmen, the decision in *Richardsons v. Samuel* (*supra*), where it was held that non-employment of men because there is no work for them to do is not a lock-out, becomes one of importance to those interested in such a clause as we are examining.

The words "strike" and "lock-out" are subject of statutory definition in a recent Indian statute, namely, the Trades Disputes Act, 1929,<sup>2</sup> section 2, clauses (e) and (f) of which are in the following respective terms:—

"(e) 'Lock-out' means the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him, where such closing, suspension or refusal occurs in consequence of a dispute and is intended for the

<sup>1</sup> This is one of what are known as the Institute (Cargo) Clauses: and as such is commonly included in all modern marine policies based on English models.

<sup>2</sup> Act VII of 1929.

purpose of compelling those persons, or of aiding another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment;"

"(i) 'Strike' means a cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment."

The foregoing definitions will, it is conceived, be accepted by the courts in India as aids to the interpretation of a warrant relating to strikers and locked-out workmen. It is also submitted that a striker is one who takes part in a strike. Accordingly in this regard the case of *Smith v. Wood*, [1926-27] 43 T.L.R. 179 may usefully be referred to. That case turned on an interpretation of one of the Emergency Regulations, 1926, in England, wherein Regulation 21 made penal the doing of anything or the attempt to do anything calculated or likely to impede, delay or restrict the supply or distribution of certain necessary commodities. There was a proviso, however, that no one should be held guilty of an offence under the Regulation "by reason only of his taking part in a strike . . . ." A board having been formed of engine-men, miners and others employed in a certain colliery area appointed one W. K. Smith as their secretary, who, in the course of the duties which he undertook, forwarded a copy of a resolution of this board to the managers of certain collieries and also to the owners' association. This resolution gave an intimation by way of warning, that in a certain eventuality the "safety men" who by agreement were remaining at their posts during a strike of the miners generally, would be called out. On conviction by local justices of an offence against this regulation, and on a case stated by them to the King's Bench, the conviction was set aside, one member of the Divisional Bench (Salter, J.) being of opinion that the secretary's action constituted "taking part in a strike" within the meaning of the proviso. It is submitted that this *dictum* is correct; and that it would seem to follow as a matter of logic that one who may be held to be taking part in a strike should be classified as a "striker"; and in like manner that an employee who is the victim of a lock-out is a "locked-out workman" within the meaning of this warranty.

The words "*taking part in labour disturbances*" would, no doubt, include those who, not being themselves workmen, are nonetheless often found playing the part of agitators at the time of labour disputes, and whose ranks are oftentimes responsible for particular acts of disturbance.

Turning to the word "*riots*" we are again led to the statute law of the land. The law of crime in India is almost entirely codified. The topic of riot, though the word itself is not defined, is dealt with in a group of sections from 141 to 146 of the Indian Penal Code.<sup>1</sup> In these sections the offence of rioting is defined with reference to the earlier statutory definition of an unlawful assembly. It is necessary, therefore, to refer to the definition of the latter which is to be found in section 141 and which reads as follows:—

"141. An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is first to overawe by criminal force or show of criminal force the

<sup>1</sup> Act XLV of 1860.

legislative or executive government of India or the Government of any presidency or any lieutenant governor or any public servant in the exercise of the lawful power of such public servant; or, second, to resist the execution of any law or of any legal process; or, third, to commit any mischief or criminal trespass or other offence; or, fourth, by means of criminal force or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment or to enforce any right or supposed right: or, fifth, by means of criminal force or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

*Explanation.*

An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly."

The offence of rioting as set forth in section 146 imports the concept of an unlawful assembly engaged in pursuing its common object. The relative section is thus worded:—

"146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly every member of such assembly is guilty of the offence of rioting."

The expression "civil commotion", so far as the author is aware, has not been the subject of judicial definition in India. In an English case, alluded to in an earlier part of this present chapter (*Republic of Bolivia v. Indemnity Mutual Marine Assurance Co.*, [1909] 1 K.B. 785 C.A.), an attack on a ship by revolutionaries was held to be "civil commotion" and not "piracy".

3. *Should the risks excluded by Clause 1 (F.C. & S. Clause) be reinstated in this policy by deletion of the said Clause, or should the risks or any of them mentioned in the same clause or the risks of mines torpedoes bombs or other engines of war be insured under this policy, then notwithstanding anything in this policy to the contrary*
- (a) *the insurance against the said risks shall not attach to the interest hereby insured or to any part thereof*
  - (i) *prior to being on board an overseas vessel,*  
(*For the purpose of this Clause 3 an overseas vessel shall be deemed to mean a vessel carrying the interest from one port or place to another where such voyage involves a sea passage by that vessel*)
  - (ii) *after being discharged overseas from an overseas vessel at the final port of discharge or*  
*after expiry of 15 days counting from midnight of the day on which the overseas vessel is safely anchored or moored at the final port of discharge, whichever shall first occur,*
  - (iii) *at a port or place of transhipment to another overseas vessel after expiry of 15 days (counting from the midnight of the day on which the overseas vessel entering with the interest is safely anchored or moored) until the interest is on board the on-carrying overseas vessel.*

*In the event of the exercise of any liberty granted to the Shipowner or Charterer under the contract of affreightment whereby such contract is terminated at a port or place other than the destination named therein such port or place shall be deemed the final port of discharge<sup>1</sup> for the purpose of this Clause.*

- (b) *this policy is warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests restraints or detentions of Kings Princes Peoples Usurpers or persons attempting to usurp power.*

This clause is intended to limit liabilities in the nature of war risks which have been assumed in more general terms elsewhere in the policy, either by deletion of the F.C. & S. clause or otherwise. Sub-clause (b) presents an example of the introduction of the words "usurpers or persons attempting to usurp power".

In the particular policy we are examining the warranties comprised in clause 3, sub-clauses (a) and (b), are followed by a stipulation (printed in bolder type) worded as follows:—

*"If anything contained in this policy shall be inconsistent with clause 3 (a) and 3 (b) or either of them it shall to the extent of such inconsistency be null and void."*

4. *Held covered (subject to the terms of these clauses) at a premium to be arranged in case of deviation or change of voyage, or other variation of the adventure by reason of the exercise of any liberty granted to the shipowner or charterer under the contract of affreightment, or of any omission or error in the description of the interest vessel or voyage.*<sup>2</sup>

This clause (amongst other things) attracts the topic of deviation. The word "deviation" means, in the law relating to shipping, a departure from the course of the voyage stipulated in the contract or, where such a course is not specifically described, a departure from the customary course.<sup>3</sup> In the law of marine insurance the word is used sometimes of an alteration in the course of the voyage of such a character as would make it a deviation under the law relating to shipping generally, and sometimes of any departure from the conditions of the policy. It is, however, most commonly used in the former of the two senses. The clause under examination is intended to provide the assured with cover in spite of any departure from the conditions agreed upon in the policy so long as any variation contemplated by the clause is permissible under the contract of affreightment. The reader is already aware that this particular policy is upon goods and not upon ship. And his attention has already been directed to an earlier clause whereby the risk is held covered in case of deviation or change of voyage at a premium to be arranged provided notice be given on receipt of advices. It is perhaps somewhat strange that some stipulation as to notice does not find a place in the clause now under discussion. The custom of merchants, however, as accepted by authority, requires notice of deviation within a reasonable time after the assured receives the relative advice. (*Thames and Mersey*

<sup>1</sup> This sub clause is another well-known Institute (Cargo) Clause.

<sup>2</sup> This is the Institute form of common "Deviation Clause". See, in regard to port of discharge, what is said below under "Deviation".

<sup>3</sup> See the definition with authorities cited at pp. 111 and 152, ante.

*Insurance Co. v. Van Loun*, [1917] 2 K.B. 48; *Hood v. West End Packing Co.*, [1917] 2 K.B. 38 C.A.) Delay in giving notice is excusable if a more prompt notice would on the facts have conferred no benefit on the underwriters. (*Mentz Decker & Co. v. Maritime Insurance Co.*, [1910] 15 Com. Cas. 17; *Hewitt v. London General Insurance Co.*, [1925] 23 Lloyd, L.R. 243.) It is important to note that an undisclosed intention to alter the risk at the time when the insurance was effected is not covered by an ordinary deviation clause of this kind. (*Laing v. Union Marine Insurance Co.*, [1895] 1 Com. Cas. 11.)

The words "at a premium to be arranged" need comment: the law being, according to the custom of merchants, that where no arrangement is in fact come to, a premium reasonable in the circumstances is nonetheless payable, i.e., a reasonable addition to the previously agreed premium is claimable. This is on the analogy of "reasonable price" under the law relating to sale of goods. What is a reasonable sum in such circumstances, is, of course, a question of fact.<sup>1</sup>

"Deviation" as a term of art and in regard to the voyage itself is to be distinguished from a mere "change of voyage" as also from mere "delay". (*Wooldridge v. Boydell*, [1778] 1 Doug. 16; *Bottomley v. Bovill*, [1826] 5 B. & C. 210; *Simon Israel & Co. v. Sedgwick*, [1893] 1 Q.B. 303 C.A.) The same chain of cases establishes the principle, however, that though a mere change of voyage is something other than a deviation, the effect, unless otherwise provided for in the policy, will operate as a discharge of liability of the underwriter as from the time when the determination to change actually appears: though at that moment the ship may not have departed from the agreed course when the loss occurred. (See also *Tasker v. Cunningham*, [1819] 1 Bligh H.L. 87.)

So, too, the underwriter may be discharged where in the case of a voyage policy there is undue or unexcusable "delay" in prosecuting the voyage. Such a discharge operates from the moment the delay becomes unreasonable. (*Company of African Merchants v. British Insurance Co.*, [1873] 8 Exch. 154; *Schroder v. Thompson*, [1817] 7 Taunt. 462, where the delay was excused; *Samuel v. Royal Exchange*, [1828] 8 B. & C. 119, excused on the ground of the circumstances being outside the Master's control or that of his owner.)

The English Code defines deviation and lays down when deviation or delay is to be excused. The relative provisions, being founded upon principles already well settled by authority, may usefully be set out here; for it is conceived that the courts in India will follow and apply those principles which have thus found favour in England. The sections of the English Code alluded to are sections 46, 47 and 49 and are thus worded:—

"46. Deviation.—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from any liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the Policy:—

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

<sup>1</sup> Some examples of "held covered" clauses of this kind will be found in *Hyderabad (Deccan) Co. v. Willoughby*, [1899] 2 Q.B. 530; *Greenock Steamship Co. v. Maritime Insurance Co.*, [1903] 1 K.B. 367; *Hewitt Bros. v. Wilson*, [1914] 20 Com. Cas. 241 C.A.

- (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract."

The word "intention" here is to be contrasted with the word "determination" used on page 173, *ante*. In the words of Lord Eldon in *Tasker v. Cunningham* (*supra*), "undoubtedly a mere meditated change does not affect a policy. But circumstances are to be taken as evidence of a determination, and what better evidence can we have than that those who were authorised had determined to change the voyage?"

A case recently decided in the Court of Appeal (*Reardon Smith Lines Ltd. v. Black Sea & Baltic General Insurance Co. Ltd.*, [1938] 2 All E.R. 706) illustrates the difficulties which arise where a policy of marine insurance has to be read with the contents of the particular bill of lading or of a charterparty to determine whether the course pursued by a ship amounts to a deviation or is something permitted by the usual "Touch and Stay" or "Deviation" clauses; or, again, whether an apparent deviation is in reality not to be so regarded, by reason of some custom which has to be read into the policy. It has for long been the settled law that liberties given by the "Touch and Stay", or ordinary "Deviation", clauses have reference in a voyage policy to places which are substantially on the direct geographical route between the two ports named in the policy. For the ship to touch anywhere else would thus be a deviation excusable only on one or more of the grounds enumerated above. It was proved in the case now commented upon that 75% of the owners' vessels proceeding to and from the ports named in the policy did not call at Constanza while the remaining 25% did. On the facts, the majority of the court of appeal held that the attempt to establish a custom of calling at Constanza and thereby establishing an alternative route via that port so as to escape deviation, failed. The majority went further, holding that as the words of the charterparty were unambiguous and provided for a direct route, evidence as to the alleged trade custom was inadmissible. They held the call at Constanza to amount to a "deviation".

"47. Several ports of discharge.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but in the absence of any usage or sufficient cause to the contrary, she must proceed to them or such of them as she goes to, in the order designated by the policy. If she does not, there is a deviation.

(2) Where the policy is to 'ports of discharge', within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not, there is a deviation."

"49. Excuses for deviation or delay.—Deviation or delay in prosecuting the voyage contemplated by the policy is excused:—

- (a) Where authorized by any special term in the policy; or
- (b) Where caused by circumstances beyond the control of the master and his employer; or
- (c) Where reasonably necessary in order to comply with an express or implied warranty; or
- (d) Where reasonably necessary for the safety of the ship or subject-matter insured; or

- (e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or
- (f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or
- (g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch."

The following cases illustrate what the courts in England have accepted as excusing deviation or delay: *Puller v. Glover*, [1810] 12 East 124; *Naylor v. Taylor*, [1829] 9 B. & C. 718; *Hyderabad (Deccan) Co. v. Willoughby*, [1899] 2 Q.B. 530; *Ellon v. Brogden*, [1740] 2 Stra. 1264; *Delaney v. Stoddart*, [1776] 1 T.R. 22; *Bouillon v. Lupton*, [1863] 15 C.B. (N.S.) 113; *Scaramanga v. Stamp*, [1880] 5 C.P.D. 295; *Ross v. Hunter*, [1790] 4 T.R. 33. Clause (e) of section 49 of the English Code dates from five years before the passing of the Maritime Conventions Act, 1911,<sup>1</sup> which imposes upon the Master a duty to render salvage services where human life is in danger.

*It is understood and agreed that no claim under this Policy will be paid in respect of drugs to which the various International Conventions relating to Opium and other dangerous drugs apply unless*

- (a) *The drugs shall be expressly declared as such in the policy and the name of the country from which, and the name of the country to which they are consigned shall be specifically stated in the policy*

*and*

- (b) *The proof of loss is accompanied either by a license, certificate or authorization issued by the Government of the country to which the drugs are consigned showing that the importation of the consignment into that country has been approved by that Government, or, alternatively, by a license, certificate or authorization issued by the Government of the country from which the drugs are consigned showing that the export of the consignment to the destination stated has been approved by that Government.*

The above clause is not in form a warranty but creates conditions precedent. Its special reference to the trade in dangerous drugs, which is a prominent feature in Asiatic commerce, may well find a place in policies covering merchandise shipped out of or into Indian ports. The manufacture, import, export and the distribution of a number of habit-forming narcotic drugs has been the subject of international conventions, the more important of which were the Hague Convention of the 23rd of January, 1912, and the Geneva Conventions of February the 18th, 1925, and of the 13th of July, 1931. Most parties to those conventions subsequently passed appropriate legislation to give effect to them. In England a number of Dangerous Drugs and Poisons Acts were passed between 1920 and 1933. In India the manufacture and sale of dangerous drugs is controlled by the Excise Acts locally administered by the provincial departments concerned. Rules regarding the importation of these drugs are creatures of the Indian Sea Customs Act read with the relative

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<sup>1</sup> 1 & 2 Geo. V, c. 57.

Government notifications. Provincial Acts (e.g., Bengal Act IV of 1866<sup>1</sup>) provide penalties for the introduction of any drug into a barrack or into a war-ship. Touching adulteration of drugs the Indian Penal Code has certain provisions.<sup>2</sup>

*Warranted free from Particular Average unless the vessel or craft be stranded, sunk or burnt, but notwithstanding this warranty the Insurers are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also for any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water or to discharge of cargo at port of distress, also to pay Landing, Warehousing, Forwarding and special charges if incurred for which insurers would be liable under a policy covering Particular Average. This clause shall operate during the whole period covered by the Policy.*<sup>3</sup>

This clause in the policy under examination stands first in the marginal stipulations. It is an example of a clause which though it begins with the three words "warranted free from" does not in fact constitute a warranty in law. To the student this may prove difficult to understand and remember. The test of a warranty in law, however, is the intention of the parties as expressed in the words by which they mean to be bound. If the words in any clause are intended to amount to a warranty, then it must be plain from those words that the parties intend a breach of the warranty to discharge the underwriter from his liability. But it has been long recognized that this familiar clause "warranted free from particular average" is not intended to carry with it the result that the existence of even a trifling particular average loss would avoid the policy. So in contemplation of law, whilst this well-known form of clause provides an exception from the risks undertaken, it is not a warranty properly so-called. It is well-settled that no particular form of words is necessary to constitute an express warranty: any form will suffice which conveys an intention to warrant. (*Union Insurance Society of Canton Ltd. v. Wills*, [1916] 1 A.C. 281, 287; *Yorkshire Insurance Co., Ltd. v. Campbell*, [1917] A.C. 218, 224, 225.) Indeed a mere description, if sufficiently precise and of fundamental importance, may be construed as a warranty, e.g., a "Danish brig", goods "on board the Mount Vernon, an American ship", are words of descriptive importance which have been construed as amounting to warranties, the inaccuracy of which description would thus constitute a breach resulting in avoidance of the policy.

It will be noticed that the exception does not take effect if the vessel or craft be "stranded, sunk or burnt". What amounts to a "stranding" has already been dealt with in an earlier part of this chapter.<sup>4</sup> Not all the decisions are easily reconcilable.<sup>5</sup> There is, as yet, no judicial decision as to the meaning of the word "sunk" in this clause. In one case in 1886 a jury found that a partly submerged vessel which had contrived to reach port in that condition had not sunk within the meaning of the policy sued upon. (*Bryant & May v. London Assurance Corp.*, [1886]

<sup>1</sup> Sec. 33.

<sup>2</sup> Secs. 274 and 276.

<sup>3</sup> This is the Institute form of the common "F.P.A. Clause".

<sup>4</sup> See p. 164, ante.

<sup>5</sup> See the discussion in Arnould, 11th Ed., Secs. 886-890.

2 T.L.R. 591.) In India the difference between "sinking" and "stranding" was considered by the Bombay High Court in *Haji Hasan Janoo v. Choonilal Chotalal*, [1905] 29 Bom. 360. There the facts were that as the vessel was entering the port at Karachi she took the ground about a 100 yards from the wharf. She then heeled over to starboard and with the rising tide became wholly or partially filled with water. She was shortly afterwards lightened by removal of part of her cargo. She was thereupon floated and was safely brought alongside the wharf. The Court held this to be no "sinking", but merely a "stranding", whereby the insurers incurred no liability under the warranty.

In an earlier case in the same Court the warranty was in the more usual form, i.e., "warranted free of particular average unless stranded, sunk or burnt". The ship went aground on some rocks off the port of Jeddah. The Court construed a clause in Gujarati as not inconsistent with the express warranty in the English language, and the underwriters were held liable for a particular average loss. (*Hajee Esmail Hajee Sidick v. Shamji Poonjani*, [1878] 2 Bom. 550.)

From the decision in *The Glenlivet*, [1893] P. 164, and [1894] P. 48, it is to be collected that a vessel must be substantially damaged by fire before she can be held to have been "burnt" within the meaning of this clause. The Court of Appeal in that case treated it as a pure question of fact as to whether a vessel could be called a "burnt" ship within the ordinary meaning of the English language.

By the concluding portion of the clause under examination the underwriter, notwithstanding the generality of the exception which the earlier part of the clause expresses, shows himself content to bear the insured value of packages totally lost where, amongst other things, the loss and damage may reasonably be attributed to fire, collision or contact of the vessel with a foreign substance (ice included) and to meet all forwarding and special charges for which he might be liable under a policy expressed as one "with particular average". In this context it is necessary to point out that what is said in this clause as to the vessel coming into contact with a foreign substance, is inserted in order to overcome the difficulty that in marine insurance the word "collision" refers only to the striking of one vessel against another, and does not cover damage brought about by contact between a vessel and some external substance other than the hull of another vessel.

The principles governing recovery where an "F.F.A." warranty is included, were well-settled by authority in England before the Code of 1906 was passed. See *Hagedorn v. Whitmore*, [1816] 1 Stark 157; *Navone v. Haddon*, [1850] 9 C.B. 30; *Ralli v. Janson*, [1856] 6 E. & B. 422; *Duff v. Mackenzie*, [1857] 3 C.B. (N.S.) 16; *Kidston v. Empire Insurance Co.*, [1866] 1 C.P. 535 and the cases there reviewed at 548; *Cator v. Great Western Insurance Co. of New York*, [1873] 8 C.P. 552, 559; *De Mattos v. Saunders*, [1872] 7 C.P. 570; *Price v. Al Small Damage Assn.*, [1889] 22 Q.B.D. 580; *Oppenheim v. Fry*, [1893] 3 B. & S. 873, 884; *Fabrique De Produits Chimiques v. Large*, [1923] 1 K.B. 203. The effect of the authorities has been incorporated in section 76 of the English Code in these words:—

"(1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly insured pursuant to the provisions of the suing and labouing clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded."<sup>1</sup>

It were inconsistent with the scale of this treatise to comment upon, or even to enumerate, all the clauses in a policy of marine insurance which modern commercial usage has devised, and which may be classified as "warranties". It is proposed, therefore, to touch upon only a few types of clause as to the interpretation or effect of which something needs to be said. And in order that the reader may grasp the relationship which exists between a warranty which is expressed by the language of a particular clause, and those other warranties which, though not so expressed, the law nevertheless implies, it needs to be pointed out that where there is inconsistency between an express warranty and one which is to be implied, the express warranty prevails. (*Quebec Marine Insurance Co. v. Bank of Canada*, [1870] 3 P.C. 234; *Sleigh v. Tyser*, [1900] 2 Q.B. 333.) A ship is sometimes warranted to be in "good safety", or to be otherwise "well" on some particular date. This is an old warranty, and since *Blackhurst v. Cockell*, [1789] 3 T.R. 360, it has been held to be sufficient compliance with such a warranty if she be safe at any time during that day.

**Warranty of Neutrality.**—Sometimes a warranty itself sets up, by necessary implication, some condition which has to be fulfilled; and thus, in a sense, the express warranty creates an implied warranty. An example is a warranty of neutrality, as to which the English Code has the following provisions:—<sup>2</sup>

"(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted 'neutral' there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented; that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition the insurer may avoid the contract."

The subject of neutrality is so large as to be outside the scale of the present treatise. The reader is therefore referred to standard works not only on marine insurance but on prize law and jurisdiction. It must

<sup>1</sup> By the rules of the English Association of Average Adjusters the expenses incidental to protest, survey, and other means of proving the loss are not included. The Code thus gives statutory sanction to a well-known custom.

<sup>2</sup> Sec. 36.

suffice for our present purpose to remind the student that by the law of nations—following immemorial usage—an enemy's ship, whether warship or merchantman, and an enemy's sea-borne goods, are liable to capture and confiscation. The municipal law of the modern world includes the provision of juridical methods of determining whether a particular vessel or her cargo is or is not to be condemned as prize of war. Where a vessel is so condemned by a competent court, international law recognizes that the decree or judgment operates *in rem* and gives a good title in the property so condemned against all the world. The Law of England has so regarded the matter ever since the last quarter of the 17th century. (*Hughes v. Cornelius*, [1682] 2 Smith L.C. 13th Ed. 654.) In actions on a marine policy in England the sentence of a competent Prize Court (whether of an enemy's or of a neutral country) is regarded by the courts as conclusive of the ground on which the Prize Court has professed to decide. Where the ground of the Prize Court's judgment is a matter of inference, leading, however, to the conclusion that the property condemned was not neutral, that inference has been held conclusive in an action on the policy. (*Lothian v. Henderson*, [1803] 3 Bos. & P. 499; *Bolton v. Gladstone*, [1804] 5 East 155, 160; [1809] 2 Taunt. 85; *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455, 463.)

**Divers Warranties.**—In the following cases the courts have pronounced upon the respective warranties mentioned: *Roddick v. Indemnity Mutual Insurance Co.*, [1895] 2 Q.B. 380 ("warranted (so much) per cent uninsured"); *Hart v. Standard Marine Insurance Co.*, [1899] 22 Q.B.D. 499 ("warranted no iron or ore in excess of registered tonnage": the court decided also that "iron" includes "steel"); *Cochrane v. Fisher*, [1835] 1 Cr.M. & R. 809 ("not to sail for North America after August 15"); *Birrell v. Dryer*, [1884] 9 A.C. 345 ("—no St. Lawrence between Oct. 1 and April 18"); *Simpson Steamship Co. v. Premier Underwriting, etc.*, [1905] 10 Com. Cas. 198 ("—not to proceed east of Singapore"); *Sea Insurance Co. v. Blogg*, [1898] 2 Q.B. 398 ("—sailing on or after March the 1st"); *Yangtze Insurance Assn. v. Indemnity Mutual Marine Assurance Co.*, [1908] 1 K.B. 911 ("—no contraband of war"); *Anderson v. Marten*, [1908] A.C. 334 ("—F.C. & S. 'and the consequences of hostilities'"); *Leyland Shipping Co. v. Norwich Union*, [1918] A.C. 350; *Britain Steamship Co. v. The King*, [1921] 1 A.C. 99; *Adelaide S. S. Co. v. The King*, [1923] A.C. 292 ("—F.C. & S. and 'all consequences of hostilities or warlike operations'"); *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co.*, [1909] *supra* ("—F.C. & S. 'piracy excepted'"); *Russian Bank for Foreign Trade v. Excess Insurance Co.*, [1918] 23 Com. Cas. 325 ("—excluding all claims due to delay"); *Aktieselskabet Greenland v. Janson*, [1919] 35 T.L.R. 135 ("—no mining timber carried").

**Implied Warranties.**—Foremost amongst so-called warranties, and which the law treats as implied, are those which concern the topic of sea-worthiness.

**Sea-worthiness.**—Beginning perhaps with *Bermon v. Woodbridge*, [1781] 2 Doug. 788 and *Christie v. Secretan*, [1799] 8 T.R. 192, 198, a chain of cases to *Biccard v. Shepherd*, [1861] 14 Moore P.C. 471, 493, established the doctrine that in a voyage policy there is an implied warranty that at the beginning of the voyage the ship shall be sea-worthy for the purpose of the adventure insured. So, too, there is an implied warranty that at the commencement of the risk she is reasonably fit to encounter the ordinary perils of the port in which she is lying when the insurance attaches. (*Quebec Marine Insurance Co. v. Commercial Bank of Canada*, [1870]

3 P.C. 234, 241.) Again, where the policy relates to a voyage to be performed by stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage she is sea-worthy in respect of everything required for the purposes of that stage. (*Bouillon v. Lupton*, [1864] 33 L.J. C.P. 37, 43; *Quebec Marine Insurance Co. v. Commercial Bank of Canada* (*supra*) at p. 241; *The Fortigern*, [1899] P. 140; *Greenock Steamship Co. v. Maritime Insurance Co.*, [1903] 2 K.B. 657.) A ship is deemed to be sea-worthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas on the adventure insured. (*Dixon v. Sadler*, [1839] 5 M. & W. 405, 414; *Bouillon v. Lupton*, *supra* at p. 43.)

In the *Fortigern* (*supra*), A. L. Smith, L.J., in the Court of Appeal expressed the view that coal was a part of a steamship's "equipment", and that, owing to the change from sail to steam, it was, in the case of a long voyage, impossible for a vessel to be "equipped" for the whole voyage at the start; and it had, therefore, become the practice to divide long voyages into stages so as to comply as far as practicable with the warranty of sea-worthiness. In a recent case (*Timm & Son Ltd. v. Northumbrian Shipping Co. Ltd.*, [1938] T.L.R. 501) the doctrines laid down in the *Fortigern* were applied.

In a voyage policy on goods or other moveables, there is an implied warranty that at the commencement of the voyage the ship is not only sea-worthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

As early as *Dixon v. Sadler*, [1841] 8 M. & W. 895, it was assumed that a similar implication applied to time policies. During the next generation, however, the House of Lords in two appeals decided otherwise; and by the date of *Dudgeon v. Pembroke*, [1877] 2 A.C. 284, the effect of these and other decisions could be thus stated by Lord Penzance: "The case of *Gibson v. Small*, supplemented as it was, by the two cases *Thompson v. Hopper* and *Faucus v. Sarsfield* must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been sea-worthy". The foregoing principle is now recognized by the English Code. The cases of which Lord Penzance thus makes mention were considered in India in 1864 by the High Court of Calcutta. In that case the policy was a time policy on ship, and it contained no express warranty of sea-worthiness. The report of the case *Hossein Ebrahim Bin Johur v. Muttyloll*, [1864] 2 Hyde 107 shows that an issue was raised as to whether, at the time the policy attached, there was any warranty of sea-worthiness. Though there is no mention in the report that the doctrine of an "implied" warranty was directly raised, the Court found as a fact that the ship was not in a sea-worthy condition at the commencement of the voyage, and (if correctly reported) wrongly construed the effect of the available English authorities on the point, but nevertheless rightly allowed the plaintiff to succeed in the action.

**Legality.**—Based largely upon the decision of *Dudgeon v. Pembroke* (*supra*) the English Code lays down that there is an implied warranty concerning the lawful nature of the adventure undertaken and "so far as the assured can control the matter", that "the adventure shall be carried out in a lawful manner".<sup>1</sup>

<sup>1</sup> Sec. 41.

**Where warranty is not implied.**—The English Code is at pains to notice certain instances, not necessarily exhaustive, where it might be thought warranties should be implied by analogy.

**Nationality.**—Based on *Dent v. Smith*, [1869] 4 Q.B. 414, 449, the rule is thus expressed in section 39 of the English Code :—

“There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.”

**Goods.**—In a policy on goods or other moveables there is no implied warranty that the goods or moveables are sea-worthy (*Koebel v. Saunders*, [1864] 17 C.B. (N.S.) 71).

**Other clauses.**—The policy chosen for examination happens to be a policy on cargo. The clauses noticed are but some of those which are usual in modern policies. Policies on ship also contain in these days a number of special clauses designed to overcome difficulties which had proved insuperable under the traditional form of a Lloyd's policy, or which had arisen from various attempts to improve upon that form. It is not possible in a summary of the law relating to marine insurance in India to deal with more than one or two of such clauses. Every standard work on marine insurance reprints the Institute clauses and to these works the reader is referred.<sup>1</sup> We shall accordingly single out for discussion a few only of these modern clauses which seem likely to have a special interest for the Indian student of this subject.

**“Inchmaree Clause”.**—This clause, as drawn, was approved by most mercantile interests of the day, and finally was adopted by the Institute, as a result of the judgment of the House of Lords in a case in which a ship called the “Inchmaree” was the subject of the policy sued upon. (*Thames & Mersey Marine Insurance Co. v. Hamilton*, [1887] 12 A.C. 484.) In its present form the clause reads as follows:—“This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo or caused through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.”

During its early history the insertion of this clause succeeded in obtaining payment of many claims in the belief that it provided an unassailable insurance against any defects in the vessel's machinery of which the assured was ignorant. The clause was later construed by Scrutton, J., in *Wills & Sons v. The World Marine Insurance Ltd.*, [1911] (*The Times*, March 14) and by the same Judge again in *Hutchins Bros. v. Royal Exchange Assurance Corp.*, [1911] 2 K.B. 398, 406, as a result of which its limitations became exposed. Upon the topic of “latent defect” it was held, in the first of the two cases mentioned above, that the breaking of a link, not from wear and tear, but through a latent defect, made the underwriters liable under this clause for the damage to the hull and machinery as well as for certain consequential damage;

<sup>1</sup> These include special clauses for insertion in voyage policies where the insurance is on the hull and/or machinery; others concern freight, while others again are applicable to cargo. Institute clauses have also been framed for time policies and to cover ship-building risks. For these see Appendix B to Arnould, 11th Ed., pp. 1705, etc.

while, in the second case, what may be recoverable by reason of a latent defect where the policy contains an "Inchmaree" clause was thus broadly stated:—“(1) Actual total loss of a part of the hull or machinery, through a latent defect coming into existence and causing the loss during the period of the policy; (2) Constructive total loss under the same circumstances, as where, though a part of the hull survives, it is by reason of the latent defect of no value and cannot be profitably repaired; (3) Damage to other parts of the hull, happening during the currency of the policy, through a latent defect, even if the latter came into existence before the period of the policy.” The learned Judge added: “The pre-existing latent defect itself is not damage, indemnity for which is recoverable, even if by wear and tear it becomes visible during the policy.”

In a more recent case (*Scindia Steamship (London) Ltd. v. The London Assurance*, [1937] 3 All E.R. 895) the Court had to consider the "Inchmaree" clause drawn in the form set out above, but without the proviso at the end of it (thus making the clause conclude with the phrase "or through any latent defect in the machinery or hull"). The central fact on which the case turned was that whilst in dry dock at Bombay for a purpose necessitating the removal of the propeller and the withdrawal of the tail-shaft (found to be an operation which the shaft in the ordinary way ought easily to have withstood) the shaft itself broke, owing, admittedly, to a latent defect. The end of the shaft and the propeller fell into the dock and the screw was injured. The insurers admitted liability in respect of the propeller, but denied liability in respect of the shaft. From the point of view of the law in India the decision is of importance in that the Court held (i) that the words "breakage of shafts" appearing in the clause could not be isolated from the context so as to make the clause read "This insurance also specially to cover breakage of shafts", but must be read in the position in which they were found, so as to cover loss of or damage to hull caused by breakage of shafts; (ii) the breakage of the shaft could not be said to be loss of or damage to machinery caused by the breakage of the shaft; (iii) damage consisting in a latent defect in the machinery was not the same as damage to machinery caused through a latent defect in machinery. The breakage of the shaft was therefore not itself covered by the "Inchmaree" clause.

**Collision or "Running-Down" Clauses.**—It will, perhaps, be of interest to Indian readers to learn that it was a collision in Indian waters between a sailing ship and one of the earliest steamships to come out to India that brought into existence the present type of collision clauses in marine policies, whether the same be on ship, on cargo, or on both.

It so happened that bad weather in the river Hooghly brought a ship styled *La Valeur* into collision with the steamship *Forbes*. The owner of the latter claimed compensation from the former and threatened to have her arrested and to proceed against her in the Vice-Admiralty Court at Fort William in Bengal. The matter, however, was referred to arbitration, and the award provided that each ship should bear half the joint expenses of the two. In the result *La Valeur* had to pay a balance to *Forbes*, and endeavoured to recover that payment as an average loss occasioned by "perils of the seas". Lord Denman, C.J., at the London Sittings, ruled it irrecoverable. Whereupon the plaintiffs moved for a new trial. The application was heard by Lord Denman sitting with Littledale, Williams and Coleridge, JJ., and a rule was refused.<sup>1</sup>

<sup>1</sup> *De Vaux v. Salvador*, [1828] 4 A. & E. 420, 431.

No one had suggested that the arbitrator had applied a wrong principle in the matter of his award. On the contrary it was admitted that assuming the facts as found, the method adopted was in accordance with the accepted law of maritime nations. The sole question was: could a payment made in accordance with such an award be regarded as "a loss directly occasioned by a peril of the seas?" The judgment of the Court on this aspect of the matter is worth quoting.

"If we look" said the Lord Chief Justice "for the principle on which *Fletcher v. Poole*<sup>1</sup> was decided, it must obviously be that well-known maxim of our law, *in jure non remota causa sed proxima spectatur*.<sup>2</sup> 'It were infinite' (says Bacon) 'for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree.' Such must be understood to be the mutual intention of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the seas; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against."

The above decision constituted a serious blow to shipowners and others; and when it became plain that a contrary view of the matter, which had been expressed by an American Court, was not destined to find favour with any other court on either side of the Atlantic, it became obvious that if the traditional policies as improved to date of the judgment in *De Vaux v. Salvador* afforded no protection, another clause must be devised to meet the situation. This eventually led to the "Liverpool clause" as it was called.<sup>3</sup> Shipowners, however, continued to feel that underwriters were in many cases not accepting all the risk which the commercial community needed to cover in "running-down" cases. A more improved type of collision clause (still in use) was gradually evolved. This runs as follows:—

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions

<sup>1</sup> I. Park's Insurance, 7th Ed., p. 89.

<sup>2</sup> "In law it is not the remote but the closest (i.e., the immediate) cause which is to be regarded."

<sup>3</sup> For the "Liverpool Clause" and for a discussion of its application, worked out in terms of money, see Arnould, 11th Ed., Secs. 792-794, pp. 1018-1022.

hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

"Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions<sup>1</sup> under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision; or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury."

The effect of the words "by way of damages" which appear in the third line of the above clause has been considered in two recent cases, *Furness Withy & Co. Ltd. v. Duder*, [1936] 2 All E.R. 119, and *Hall Bros. Steamship Co. Ltd. v. Young. The Trident*, [1938] 3 All E.R. 234. Though distinguishable to some extent upon the facts, these two cases, read together, establish the principle that the clause presupposes a liability arising in tort, and that the operative words "by way of damages" are not applicable to claims arising *ex contractu*.

It is to be noticed, then, that this clause only covers collision between ship and ship or between ship and some other craft, such as a tug actually engaged in towage; for in all such cases the courts have regarded the event as a collision within the meaning of the clause. So, too, for one vessel to strike upon another's anchor is a collision for the purpose of this particular risk. (*The Niobe*, [1891] A.C. 401; *Chandler v. Blogg*, [1898] 1 Q.B. 32; *Re Margetts & Ocean Accident & Guarantee Corp.*, [1901] 2 K.B. 792.) It is next to be noted that once there has been a collision, a shipowner obtains protection against all damages direct or consequential which the owner of the other vessel or cargo (as the case may be) is entitled to recover from him. (*The North Britain*, [1894] P. 77, 86 C.A.; *France (William) Fenwick & Co. v. Merchants Marine Insurance Co.*, [1915] 3 K.B. 290; and as to the proviso in the clause set out above, see *The Engineer*, [1898] A.C. 382; *Chapman v. Fisher & Sons*, [1904] 20 T.L.R. 319.)

As it stands the clause has no application to accidents arising from ships running into docks, piers, breakwaters, etc. (*Bennett Steamship Co. v. Hull Mutual Steamship Protecting Society*, [1913] 3 K.B. 372; [1914] 3 K.B. 57 C.A.) In some instances, however, where underwriters are prepared to accept this additional risk, the clause has been specially amended so as expressly to include it. For example, see *The Munroe*, [1893] P. 248; *Union Marine Insurance Co. v. Borwick*, [1895] 2 Q.B. 279; *Mancomunidad del Vapor Frumiz v. Royal Exchange Assurance*, [1927] 1 K.B. 567.

<sup>1</sup> See *Oceanic Steam Navigation Co. v. Burns*, [1934] 51 T.L.R. 67 C.A. (liability to a port authority with regard to the removal of a wreck).

The reader, however, will have noticed in reading the main body of the clause that, at best, it leaves the assured indemnified to the extent only of three-quarters of the damage he may have been obliged to pay. For many a long day the other quarter risk was regarded as "uninsurable", it being (as the editors of Arnould, perhaps a little uncharitably, suggest) apparently the policy of underwriters to refuse cover to the full extent "with the object of insuring that the shipowner should be substantially interested in securing the safety of his vessel". Shipowners were thus driven in many instances to become members of mutual associations for the purpose of obtaining the necessary added protection. Today, however, a "full protection" policy is obtainable from many, though not yet all, companies which hold themselves out as marine insurers.

**Various special clauses.**—Elsewhere in the present treatise<sup>1</sup> the "p.p.i. clause" and the "continuation clause" were discussed, and earlier in this chapter<sup>2</sup> the reader was made aware of the circumstances under which bills of lading can be so drawn as to include a delivery to warehouse, and that policies, in the form of marine policies, often cover the transport of goods over a journey which may be partly by land and partly by water and in which that part of the journey which is by water may be partly over ocean and partly over lake or river. To meet risks so varied and extensive appropriate clauses have long been designed and are in regular use.<sup>3</sup> Thus we have the "warehouse to warehouse" clause, the "craft" clause, the "bill of lading" clause and so forth. Approved types of such clauses are included in the "Institute clauses" to which reference has already been made.

**Inland water-way clauses.**—Many policies of marine insurance are so drawn as to cover particular average. When this is the case the policy is known to commercial men as a "W.P.A." policy. The more ordinary marine policy, however, is usually what is styled an "F.P.A." policy, that is, one in which the risks accepted are "free of particular average" save to the extent (if at all) indicated by the wording of the relative warranty.

In India—particularly over the estuarine rivers of Bengal—risks are undertaken on "F.P.A." terms only, not infrequently coupled with a small exception, expressed in the relative warranty thus: "*Warranted, etc., unless caused by the boat being stranded, sunk or in collision with another boat or vessel*".

An examination of the commoner types of cargo policies upon merchandise to be carried by a country boat (of any type suitable for traffic on inland water-ways) shows that the form is that of an ordinary marine policy, but that some traditional clauses have been modified to suit the exigencies of carriage by river; and that certain special warranties have been framed to deal with risks which are to be made subjects of exception, while others are in the nature of "promissory warranties" designed to prevent specific dangers to ship or to cargo.

The following taken from existing policies in India will illustrate what has been said above:—

1. "*Touch and Stay*" clause.—"And it shall be lawful for the said cargo boat, within the limits of the said voyage, to proceed, touch, and

<sup>1</sup> See Chapter III, p. 69, *ante*.

<sup>2</sup> Pages 102, 103, *ante*.

<sup>3</sup> In practice, considerable uniformity is attained in modern policies by agreement between underwriters who are members of a local association.

stay at any place whatsoever if thereunto obliged by stress of weather or for the safety of the cargo (not otherwise) without prejudice to this Assurance."

2. *Perils insured*.—"The adventures and Perils which the said [Insurer] agrees to bear and take upon [himself] in this voyage are of the Rivers, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said subject-matter of this Insurance or any part thereof arising from the Perils of the Rivers and Inland Navigation (*Riots and Civil Commotions, Seizures and Detentions by Police, Villagers or other persons, whether in authority or otherwise, and the consequences of any attempts thereat, always excepted*)."

3. *When grounding no "stranding"*.—"Grounding (a) during the time of loading or unloading or (b) in the usual course of navigation and management in a tidal river or waterway upon ebbing of the tide, or from natural deficiency of water, shall not be deemed a stranding within the meaning of this policy, even though damage may have resulted therefrom."

4. *Fire*.—"That the risk of loss or damage by fire in the case of all interests is hereby insured, but such cover shall be subject to the following stipulated limitations":—"The reader need not be troubled with the stipulations which follow.)

5. *Deviation and Delay*.—"That loading shall be completed within seven days, and that the said boat shall proceed without delay, and shall not deviate from the customary route nor delay upon the voyage."

6. *Detention and Delay*.—"That the boat shall not be detained in the Canal after receipt of the toll pass, and that no delay shall occur in obtaining such pass."

7. *Labour in event of accident*.—"That the Assured shall provide the Manji or Charandar of the said boat, before commencement of the voyage, with a sufficient sum of money to enable him to obtain labour and assistance in the event of accident during the voyage."

8. *Exclusive cargo*.—"That no cargo belonging to any person other than the Assured shall be carried in the said boat during the voyage aforesaid."

9. *No smoking or naked lights*.—"That no smoking or cooking shall be carried on in the said boat, nor shall naked lights be used."

10. *Special endorsement to cover rail transit*.—"That the risk of river delivery in .... is not covered should the interest hereby insured be brought into ... by Rail (unless specially provided hereon in writing in which case boat risk in ... will be subject to all the terms and conditions of this Policy)."

## 7. Common Carriers.

It has always been a moot point as to whether Indian commercial life, before the British transplanted their own ideas to this peninsula, exhibited anything corresponding to the public or common carrier who has been so familiar a feature of English life from immemorial times. A common carrier has been many times defined by judicial decisions. Synthetically expressed, those decisions reveal a common carrier to be one who holds himself out to the public as being ready to carry for anyone who wishes to engage his services and is prepared to pay his charges. Thus the question whether a man is or is not a common carrier is one of fact; and a man may be a common carrier without so styling himself. (*Belfast Ropework Co. v. Bushell*, [1918] 1 K.B. 210.)

It was very early decided that common carriers were under an obligation to carry. It was said that this obligation was imposed by the custom of the realm and had nothing to do with contract. As Dallas, C.J., said in *Bretherton v. Wood*, [1821] 3 B. & B. 54, 62, "a breach of this duty is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it". In the course of time it became possible, from the relative decisions, to enumerate what the courts held might reasonably excuse a common carrier in declining to carry goods tendered to him, e.g., (i) That the goods were not of the description which he professed to carry. (ii) That they were of a perishable or of a very fragile and delicate nature and that he did not profess to carry such goods except under the terms of a special contract exonerating him from responsibility for deterioration incident to the transit. (iii) That he had no accommodation. (iv) That the goods were tendered at an unreasonable hour. (v) That he was not ready to set out on his accustomed journey. (vi) That the consignor was not ready and willing to pay the reasonable fare or freight fixed for carriage of the goods offered (including insurance charge for valuable articles).<sup>1</sup> (vii) That the carriage of the goods was attended with great danger.

The common law duties, then, may be succinctly stated as follows:—

(1) To receive for carriage all goods offered, provided he has convenience to carry them, and the goods are of a proper kind and the consignor is ready and willing to pay the proper and reasonable reward.

(2) To carry for a reasonable reward and to deliver the goods within a reasonable time.

(3) To insure their safety during the carriage and until delivery, the act of God and of the King's enemies, or damage arising from inherent vice in the goods consigned, only excepted.

It is important to note, however, that included in the notion of inherent vice is bad packing. It is also the duty of a common carrier to provide a vehicle reasonably fit for the purpose. (*L. & N.W. Ry. Co. v. R. Hudson & Sons*, [1920] A.C. 324.)

Thus it is that a common carrier is an insurer of goods entrusted to him for carriage and can only excuse himself on some such grounds as above-mentioned.

In 1865 was passed the Indian Carriers Act (III of that year). It provides that common carriers shall not be liable for the loss of, or injury to, certain articles whose value is over Rs. 100 unless that value and the nature of the articles be declared when tendering the same to the carrier, and an increased charge, if demanded, shall have been paid. Further provisions permit of the parties entering into special contracts, so long as such contracts be in writing and signed by the owner of the goods or some person duly authorized by the owner in that behalf.

It has long been decided in India that public carriers by water over inland rivers are common carriers, to whom the Carriers Act applies. This view depends on section 2 of the Act which defines a common carrier as "a person, other than the government, engaged in the business of transporting for hire property from place to place by land or inland navigation, for all persons indiscriminately". Thus carriers for hire by sea are not within the Indian Carriers Act. That they are nonetheless common carriers *dehors* the act is well-settled.

<sup>1</sup> "The carrier is entitled to have his reward paid to him before he takes the package into his custody" (*Batson v. Donovan*, 4 B. & A. 21).

The Courts in India are divided as to whether the English common law applies in India to carriers by sea. In *Mackilloan v. Compagnie des Messageries Maritimes, etc.*, [1880] 6 Cal. 227, the Calcutta High Court held that a foreign company is not a common carrier in the ordinary English sense of the word; and that if the contract be made in British India its liability is that of a bailee under sections 151 and 152 of the Indian Contract Act. On the same facts, and in a suit against the same defendants, the Madras High Court held that the English Common Law as to common carriers applied (*Hajee Ismail v. Compagnie des Messageries Maritimes, etc.*, [1905] 28 Mad. 400); while a single Judge of the Bombay High Court expressed doubts as to whether the English Common Law ever applied to carriers by sea.

It is not, however, considered necessary for the purposes of the present chapter, and, in particular, for the purpose of discussing certain clauses in marine policies designed to cover risks incident to inland navigation, to stray further from the position of carriers to whom the Indian Carriers Act admittedly applies.

It is submitted that the true view of the position of a common carrier in India is that stated by the Calcutta High Court in *British and Foreign Marine Insurance Co. v. I.G.N. & Ry. Co., Ltd.*, [1910] 38 Cal. 28, namely, that the relative rights and liabilities of common carriers and those for whom they carry are outside the Indian Contract Act, and are governed by the principles of the English Common Law as modified by the Indian Carriers Act of 1865; that a common carrier in India is subject to two distinct classes of liability, the one for the losses for which he is liable as an insurer, the other for losses for which he is liable under his obligation to carry safely; that, speaking generally, the first of these are insurable risks from which the element of default is absent, the second are risks of conveyance in which that element is present; that the effect of sections 6, 8 and 9 of the Carriers Act of 1865 is that the liability of a common carrier for the loss of goods (not being of the description contained in the schedule to the Act) may be limited by special contract signed by the owner thereof, save where such loss shall have arisen from the negligence or criminal act of the carrier or any of his servants or agents.

The liabilities of a common carrier who has accepted goods for transport over an inland water-way have been settled once and for all by the unanimous decision of the Courts which considered the case of the *Dekhari Tea Co., Ltd. v. I.G.N. & Ry. Co., Ltd.*; the decision of the Court of first instance being reported in [1923-24] 28 C.W.N. 302; that of the Court of appeal in [1924] 51 Cal. 304; and that of the Judicial Committee in [1923-24] 51 I.A. 28. In that case the company had accepted consignments of tea from the Assam Railways from Gauhati on the Brahmaputra to Chandpur on the Megna River. They had placed special "flats"<sup>1</sup> at the disposal of the Railway Company for this purpose, the usual method of transport by rail for this class of goods having partly broken down. The flat "*Cauvery*" had taken on a cargo of tea under the foregoing circumstances and was lying at Gauhati when, on the 21st of December, 1915, a fire broke out on board, and a portion of the cargo was thereby destroyed. As common carriers the steamship company were insurers of these goods and therefore, apart from any question of negligence, would be liable. The company's defence was that the contract between themselves and the railways was a special contract, and that they were acting.

<sup>1</sup> I.e., covered barges of relatively shallow draught and almost flat-bottomed. Hence the name.

not as common carriers, but as private carriers for reward; and thus, unless found guilty of negligence operating as the cause of the fire or otherwise as leading directly to the destruction of the goods, they were not liable. Ranken, J., in the Court of first instance held, on the facts, that in accepting the goods as it did the company was "not departing from its usual business and engaging in a different type of business". In the Court of appeal Richardson, J., observed that "a common carrier cannot divest himself of his responsibility as such without satisfying the court that in the particular transaction he acted in some other capacity". The Judicial committee upheld these decisions.

Inasmuch as marine policies, as already observed, frequently cover transit by rail as well as by inland water-way in India, it is germane to point out that railways in India (unlike those in England) have not the liability of common carriers, but are bailees under sections 151, 152 and 161 of the Contract Act, and that by section 72 (3) of the Indian Railways Act (IX of 1890) their liability as bailees is not to be affected by anything in the common law of England or in the Indian Carriers Act of 1865. Accordingly an Indian Railway is not *per se* an insurer of the goods which it carries. The point directly arose, and was so decided by the Court, in *Surendra Lal Choudhuri v. Secretary of State, etc.*, [1916-17] 21 C.W.N. 1125, 1127. The decision of the Bombay High Court in *Raisett Chandmull Hamirmull & Anr. v. Great Indian Peninsula Railway Company*, [1893] 17 Bom. 723 is to the same effect.

### 8. Multiple Insurance.

The risk attending property or a particular interest in property may be covered in more than one way; hence arose commercial measures which are to be classified as "double insurance", and "re-insurance". These terms will shortly be explained.

It will be well, however, before entering upon this explanation to clear the ground of those questions which sometimes arise as to whether a single instrument covering cargo is or is not to be read as embodying a number of separate insurances, each for a part of that cargo. An early case in India will serve to illustrate the circumstances in which such questions sometimes arise. In *Hadjee Joosoop & Ors. v. Vardon & Ors.*, [1864] 1 Hyde 198, the suit was brought on a policy of insurance in respect of 1,179 bags of sugar, shipped on board a vessel afterwards lost on the Fultah sands in the Calcutta river. In the particulars given in the margin some four lots of sugar were separately mentioned. They differed each from the other not only as to quality and price, but as to the size of the component packages. They had, in fact, been bought from different vendors. By the circumstances attending the wreck, the whole of the 1st, 2nd and 4th lots were lost. Plaintiffs sought to recover for what they described as the "total" loss of 944 bags out of the consignment covered by the policy. The policy contained an F.P.A. warranty concluding with the words "anything herein contained to the contrary notwithstanding". It was held that the fact that the sugar had been particularized as being in different lots containing different species, and being separately priced, did not raise any presumption that a separate insurance upon each lot or species was intended, and that accordingly the underwriters were exempted by the warranty from all liability unless the whole consignment were to be lost. In the same year the case of *Berrooppo Setty v. Huromull Ramchand*, [1864] 2 Hyde 74, was decided upon similar principles.

**Floating Policies.**—Multiple insurance is in some sense effected by a floating policy under which more than one "declaration" (whereby the terms of the policy are attracted to a specific adventure) has been made. The effect is to create as many separate contracts of insurance as there are declarations by the policy-holder. For the above reason, and for want of sufficient identification of anything beyond one adventure, a policy expressed as on specified goods "*per* a named steamer and/or steamers" is not a floating policy, but is merely a policy covering a single adventure on specified goods either in a steamer named or, in the alternative, in an unnamed steamer or steamers. In such a case the insurer is under no obligation to declare any other steamer than the one named (*Dickson & Co. v. Devitt*, [1916] 86 L.J. K.B. 315).

In a floating policy the requisite declarations designed to bring about the attachment of liability under it are usually made by endorsements on the instrument, but are valid if made in any customary manner. *Ionides v. Pacific Insurance Co.*, [1871] 6 Q.B. 674, 682. Declarations to be valid must be honestly made and, unless it be otherwise provided in the policy, must be made in the order of despatch or shipment. Section 29 of the English Code embodies these well-settled principles of the law relating to floating policies as the same stood in England at the date of the enactment.

**Additional Insurance.**—A recent case in England provides a good example of how additional insurance may be provided under a floating policy, while retaining such cover as an earlier insurance, by means of a valued policy with other underwriters, could secure. The example selected is not a case of double insurance, nor of multiple insurance properly so-called, but might conveniently be styled one of "additional insurance".

In *Boag v. Standard Marine Insurance Co., Ltd.*, [1936] All E.R. 844, the buyers of certain consignments had taken over policies effected by their sellers with the defendant company, the property being therein valued at £685. But the value of the cargo had increased before the shipment reached its destination. The cargo-owners, however, were the holders of a floating policy with Lloyd's underwriters for £5,000 and had prudently insured their cargo by a declaration under that policy to the extent of £215 as representing "increased value"<sup>1</sup>. The ship ran aground and the insured cargo was jettisoned and became a total loss. Both the Standard Marine and the Lloyd's underwriters paid the total of the respective claims made upon them, and each took a letter of subrogation from the cargo-owners. The cargo-underwriters had, however, no knowledge of the existence of the increased-value policy until after they had paid as for a total loss. The plaintiff in the case represented the Lloyd's underwriters who, in an Inter-pleader action, claimed against the cargo-underwriters to receive what they alleged to be their "proportion of the general average allowance", applicable to the increased-value policy. They also based their claim under their letter of subrogation. The Court, however, disallowed their claim and awarded the cargo underwriters the whole of the balance receivable under the general average adjustment. According to the judgment of Branson, J., the doctrine which creates a right of contribution between insurers who have separately

<sup>1</sup> This was in respect of cargo. It has been held that an "increased-value" policy on ship is an insurance on the *rem* (i.e., the thing) and not against a third party liability. (*Holman & Sons v. Merchants Marine Insurance Co.*, [1919] 1 K.B. 383.)

issued policies covering the same assured, and in respect of the same adventure and interest, has no application where the original policy is a valued policy, and the further policy covers a further risk. The letter of subrogation to the Lloyd's underwriters could not give them any better claim against the cargo-underwriters than the assured himself had. Consequently, as the assured was concluded as to the amount of his claim by the value appearing on the face of the policy, there was no room for any further demand to which the second insurers could be subrogated.

**Double Insurance.**—The law permits a person desirous of securing himself against a particular risk to insure that risk with as many persons as may be prepared to accept it for an agreed premium. In other words, he may take out as many policies in respect of the same subject-matter with as many separate insurers as he can find. When the same interest is insured by the same person but with more than one insurer, the risk is said to be doubly insured. Where ultimately it turns out that the whole amount for which a given interest is thus insured is more than the whole value of the interest at risk, that interest is said to be "over-insured" to the extent of the balance. In the law relating to marine insurance double insurance is permissible in any form unless made fraudulently. Over-insurance carries with it certain legal consequences to which special reference will shortly be made. It has, however, to be pointed out that although a person may take out any number of policies covering the same interest in the same marine adventure, a contract of marine insurance being one of indemnity, he cannot recover out of the aggregate of the sums expressed in the policies, anything more than what he has actually lost by the event which gave rise to his claim. He may, however, claim against every underwriter at his option either in part or in full and in any order he pleases.

**Over-Insurance.**—Since *Newby v. Reed*, [1763] 1 Wm. Bl. 416, and *North Brit. Ins. Co. v. London, Liverpool & Globe Insurance Co.*, [1877] 5 Ch.D. 569, where the effect of double insurance is to over-insure, each insurer is bound, as between himself and the others, to contribute rateably to the loss in proportion to the liability which he has contracted to accept. It follows that if any insurer has paid more than his proper share for the indemnity to which the assured is entitled, he may maintain an action for contribution against the others; for, as was well said, in cases of double insurance, "the policies are one insurance as between all the underwriters, though not one insurance for all purposes". (*Bruce v. Jones*, [1863] 32 L.J. Ex. 132, 135.)

By the law of England the valuation appearing on a policy is conclusive as between any one insurer and his assured. Curiously enough, however, the law of England permits a person doubly insuring in the manner already explained, to value the subject-matter differently in the different policies. The rule is otherwise on the continent of Europe where the complications arising from the application of the English rules to valued policies is got rid of by making the policies successively protect the property in order of date. Many modern policies, however, contain a contribution clause whereby the liability of insurers is limited to their rateable proportion of loss. A clause of this kind is practically universal in non-marine insurance.

**Return of premium.**—Under the English Code, section 84 (3) cl. (f), where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable: provided that, if the policies

are effected at different times, and any earlier policy had at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum thereby insured, no premium is returnable in respect of that policy; and when the double insurance is effected knowingly by the assured no premium is returnable.

**Insurance by different persons in respect of the same property or interest.**—The phrase “double insurance” is sometimes but erroneously used of insurances effected by different persons covering their respective risks in relation to the same property, be that ship or cargo. In such a case there arises no right of contribution, for each is a separate contract, and there can be no question of over-insurance. Thus every party, having a distinct interest which he thus makes the subject of separate insurance, is entitled to a full indemnity in respect of that interest. Then, if each succeeds in recovering the full value of the property from the particular office with which he insures, one of these offices must have a remedy against the other; and the office which has that remedy over succeeds to it by subrogation. (*North British, etc. Insurance Co. v. London, Liverpool and Globe Insurance Co.*, *supra*, at p. 583.)

The facts in the case cited are of particular interest to India with its special law of bailment under the Contract Act. A wharfinger trading as B & Co. had insured goods in his warehouse with a number of insurers including the defendant company. It is important to remember, as pointed out by the Court, that the word “property” as used in one of the policies was so used ambiguously, and that it really meant the assured’s “interest” in the goods stored. A mercantile firm, R & Co., were owners of goods lying in B & Co.’s warehouse, and independently insured those goods with a number of insurers including the plaintiff company. It was common case that B & Co. would be liable for the results of any fire if brought about by their negligence. A fire occurred, and the value of R & Co.’s goods destroyed amounted to £42,000. R & Co.’s insurers paid, whereafter R & Co.’s insurers, led by the plaintiff company, then sued B & Co.’s insurers for the full value. B & Co.’s insurers, however, contended that R & Co.’s insurers ought to contribute towards what B & Co.’s insurers would have to pay B & Co., so that the loss would be divided rateably between the two groups of insurers. The trial Judge (Jessel, M.R.), as well as the Lords Justices on appeal held that the principle of contribution had no application to such a case; but held that the plaintiff company, having indemnified the merchants R & Co. in full, were subrogated to that merchant’s right to have recourse to the wharfinger or the latter’s insurers. And upon that principle they made the ultimate liability fall where it primarily was, namely, on the wharfinger and his insurers. It is to be collected from the judgment that it was immaterial whether the liability of the wharfinger arose in contract or in tort, and that it is also immaterial how the owners of the goods had elected to obtain their indemnity, namely, whether by suing the wharfinger or the merchant’s own insurers. In the result, the right to indemnification was passed on till it was met by the person who had the primary liability in the events which had occurred. Consequently the plaintiff company succeeded.

**Overlapping policies.**—Sometimes it happens that one policy overlaps another in point of time. See *Union Marine Insurance Co. v. Martin*, [1866] 35 L.J. C.P. 181, where the point was raised in argument but not decided. There appears to be no established rule regulating the

adjustment of such a situation as between the insurers should a loss occur during the period of time covered by both policies.

**Re-Insurance.**—The law as well as the practice of England, as also of most other maritime countries including the United States, permits an underwriter to cover the whole of his risk under the policy by re-insuring that risk with another underwriter. It is well settled by mercantile usage, and now recognized by the English Code, that a policy of re-insurance need not, on the face of it, be expressly styled a contract of re-insurance. It is sufficient if it disclose that what is intended to be covered is the ship, cargo, freight or whatever it may be, with the usual detail sufficient in the case of goods and ship to identify the property. Contracts of re-insurance, like all other insurance contracts, require the utmost good faith and in the case of marine re-insurance are essentially contracts of indemnity. The assured under the original contract, has, of course, no interest in the re-insurance, e.g., it has been held that an original insurer cannot bring in re-insurers as third parties to an action on the original policy (*Nelson v. Empress Assurance Corpn.*, [1905] 10 Com. Cas. 237 C.A.) there being no connection between the two contracts. It follows that in an action on the policy of re-insurance there may be special defences.

In English policies there is commonly inserted a clause often called "re-insurance clause" of which the following may be taken as a typical example: "Being a re-insurance, subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon". In practice re-insurance is so often effected just after the slip in the original contract has been signed, and before the actual instrument sounding as a policy has been issued, that "original policy" must, in this context, be taken to mean the policy finally issued in pursuance of the original slip. It seems that where the original policy (in the above sense) becomes varied or is superseded by another policy in dissimilar terms, a re-insurer will not be liable in the case of a loss, unless he has consented to such altered terms in the original contract.

It is well settled since *Uzielli v. Boston Marine Insurance Co.*, [1884] 15 Q.B.D. 11, C.A., that an insurer having re-insured his risk need give no notice of abandonment. This doctrine has now been embodied in section 62 (9) of the English Code.

## 9. Disclosure.

The Rules as to disclosure, as the same affect contracts of marine insurance, have long been well settled in England, and are now specifically enacted in sections 18, 19 and 20 of the English Code. It is conceived that the courts in India will accept the exposition of this particular topic which the sections alluded to embody, and accordingly those sections are here reprinted *in extenso*:—

"18. *Disclosure by assured.*—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

- (a) Any circumstance which diminishes the risk :
- (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know :
- (c) Any circumstance as to which information is waived by the insurer :
- (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance which is not disclosed be material or not is, in each case, a question of fact.

(5) The term 'circumstance' includes any communication made to or information received by, the assured."

"19. *Disclosure by agent effecting insurance.*—Subject to the provisions of the preceding section as to circumstances which need not be disclosed where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

- (a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him : and
- (b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent."

"20. *Representations pending negotiation of contract.*—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact."

### 10. *Loss and Abandonment.*

In Marine Insurance, topics of loss and abandonment are commonly considered together; for the very good reason that he who deliberately abandons his property must be treated as choosing to lose rather than

retain his custody or control over it. From this conception arises the doctrine of "constructive loss". The student therefore will find that he must carefully distinguish between a *real* or (as the English Code styles it) an *actual* loss, or a state of things which the law *construes* as amounting to a loss. Naturally, a loss may be either total or partial.

The student will, however, soon find that the word "loss" is not always, even on judicial lips, used in the same sense. Sometimes it is used in the sense of something which has disappeared and so become "lost"; sometimes of an event by which the assured has been deprived of his property, though the thing, *i.e.*, a ship or a consignment of merchandise, is still in being; while quite as often it is used of the damage which the assured has ultimately sustained as the result of the event. For these reasons, the student, if he is to appreciate the case-law upon the topics of loss and abandonment, and if he has to read aright those passages in the English Code which aim at embodying that case-law, must in each instance satisfy himself as to the sense in which the substantive "loss" or the verb "lost" is being used in the context.

Allied to the topic of "loss" and "abandonment" is the so-called doctrine of "ademption", a doctrine used for the purpose of supplying a jurisprudential basis for varying in certain circumstances those respective rights which are the creatures of the doctrine of abandonment.

If at first sight the relation of these doctrines to one another appears to be complicated and difficult, it will soon lose that character if the reader will but keep in mind the prime object of a policy of marine insurance as an attempt to secure for the assured an indemnity; and if he will, as steadfastly, remember that the obligation to furnish an indemnity under a policy of insurance carries with it the rights to be subrogated to every interest which the person indemnified possessed in the subject-matter of the policy.<sup>1</sup>

**Actual total loss.**—The English Code<sup>2</sup> thus defines an actual total loss:—

"57. (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given."

It was decided as far back as *Green v. Brown*, [1743] 2 Stra. 1199, that where the ship concerned in the adventure is missing and no news of her has been received, after the lapse of a reasonable time she may be presumed an actual total loss. What amounts to a reasonable time is, of course, a question of fact. Under several of the continental codes, the period which has to elapse before such a presumption can be drawn is fixed. In an early case (*Houstman v. Thornton*, [1816] Holt, N.P. 242) it was decided that if an insurer pays on the basis of a missing ship being a lost ship, and she afterwards is found, the property in her must be treated as having already passed to the underwriter.

Since, as already observed, the property in a ship which has been condemned by a Prize Court has passed absolutely to her captors, the law of marine insurance regards the ship so seized and condemned as an

<sup>1</sup> For a discussion of the law relating to Indemnity and Subrogation, see Chapter III, pp. 50-57 and 72-77, *ante*.

<sup>2</sup> Sec. 57. The definition is based upon the following authorities: *Fleming v. Smith*, [1848] 1 H.L.C. 513, 535; *Lohre v. Aitchison*, [1878] 3 Q.B.D. 558, 562; *Cossmann v. West*, [1887] 13 A.C. 160; *Rankin v. Potter*, [1873] 6 H.L. 83, 127.

actual total loss. (*Green v. Elmole*, [1794] Peake 278, N.P.) Capture followed by wreck, and the latter followed in its turn by sentence of condemnation, is treated upon the same principle. (*Andersen v. Marten*, [1908] A.C. 334.)

A ship missing in time of war naturally creates special difficulties. All that the Court can do, however, is to determine, as best it can, and on the basis of the probabilities, whether the loss should be borne by the underwriter of the ordinary marine policy or by those who have assumed war risks. (*Munro, Brice & Co. v. The War Risks Association*, [1918] 2 K.B. 78.)

The English Code, upon the authority of *Spence v. Union Marine Insurance Co.*, [1868] L.R. 3 C.P. 427, provides<sup>1</sup> that where goods reach their destination *in specie*, but in such a condition as to be incapable of identification, the loss, if any, is partial and not total. It is further to be noted that where what is claimed for is a total loss of part, that loss is treated as a partial loss.

**Successive losses.**—It is well settled in England that an insurer is liable for successive losses even though the total sum thus payable exceeds the sum expressly assured. (*Le Cheminant v. Pearson*, [1812] 4 Taunt. 367; *Aitchison v. Lohre* (p. 162, *ante*)). There may, of course, be a special term in the policy to avoid such a state of things. Where a partial loss, not repaired or otherwise made good, is succeeded by a total loss, the former is held to merge in the latter and the assured can only recover as for a total loss. The above principles are embodied in section 77 of the English Code.

**Constructive total loss.**—A constructive total loss has been thus defined by section 60 of the English Code:—

"60. (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss,—

- (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or
- (ii) In the case of damage to a ship, where she is so damaged by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.

- (iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival."

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<sup>1</sup> Sec. 56 (5).

It is thought that the courts in India will accept the foregoing definition based, as it is (with one exception), upon the relative case-law. That exception, however, is of importance; for it is not covered by authority either in England or in India. The Court of Appeal in England, on a review of the authorities, in *Polurrian Steamship Co., Ltd. v. Young*, [1915] 1 K.B. 922, pointed out that by the law of marine insurance in England, as it stood prior to the enactment of section 60 (2) (i), if the taking of a ship out of the possession of its owners continued in operation, and was one which might at any moment become permanent and was at any rate of "uncertain" continuance, the owner would be entitled to recover upon the policy as for a constructive total loss; and that by introducing the notion of "unlikelihood" in place of the notion of "uncertainty" as the governing feature, the legislature had altered the law.

The facts in this case, briefly summarized, were as follows:—

A neutral ship with a cargo of coal and insured against the consequences of warlike operations was captured by a belligerent and deprived of her cargo. After being detained in a belligerent harbour for about six weeks, she was released. The plaintiff company gave notice of abandonment the day after the capture. (The cause of action had arisen some six years after the passing of the Marine Insurance Act, 1906.) According to the Master, he did not know, on the material date when he was interrogated by a Greek Naval Officer who had boarded the "*Polurrian*" off the island of Tenedos, that war had broken out between Greece and Turkey. But it was found as a fact that he had succeeded in conveying quite the contrary impression to the naval authorities. There would appear to have been a genuine confusion inasmuch as the Master did know—and apparently had admitted as much—that there was a state of war between Italy and Turkey, the hostilities in which, as a matter of history, had terminated the day before his ship had been seized by the Greeks. The ship was detained and the Master told that he must consider her as captured. Thereafter a considerable diplomatic wrangle ensued between the British and the Greek foreign offices. In the end, however, the ship was never brought before a Prize Court, but was released.

Unquestionably it was a matter of the greatest "uncertainty" during the whole of her six weeks' detention as to whether she would ultimately be confiscated or not, and upon this ground, as the law had stood prior to the new statute, such a state of uncertainty during such a lapse of time fell within the doctrine of constructive total loss; and the facts had but to be proved for the plaintiff to recover upon that basis. But the Court decided that the effect of section 60 (2) (i) (a) of the new Act was to cast upon the plaintiff the burden of showing that at the material date it was "unlikely" that he would recover his captured ship; and that was a burden which the Court held, in the particular circumstances, he had failed to discharge.

The case of the "*Girl Pat*" (*Masstrand Fishing Co., Ltd. v. Beer*, [1937] 1 All E.R. 158) is an even better example of the change in the law so far as England is concerned by the effect of section 60 (2) (i) (a) of the relative statute. The ship was a steam trawler owned and registered in Grimsby, and was ordered by her owners to proceed to sea on the 31st March 1936 and to join a fishing fleet some fifty miles eastwards of that port. The Master was alleged to have conspired with all but one member of the crew to make away with the vessel, intending to trade with her and ultimately to sell her. He abandoned ashore the

only member of the crew loyal to the owners. This man happened to be the engineer. The Master later falsified the log, giving himself and the crew fictitious names. He then raised money on the vessel at a Spanish port. He and his ship were not arrested until the 19th June 1936 by which date they had crossed the South Atlantic and had arrived off Georgetown in British Guiana. The owners had heard nothing of the vessel since early April, when they had heard from the engineer, who had been left ashore at Dover, that the vessel had deliberately sailed south instead of east, and had never joined the fleet. Notice of abandonment was given to the underwriters on the 28th April 1936, but was declined. News of the money fraudulently raised by the Master in Spain was received by the owners in the middle of May and an amended notice grounded upon barratry was then served, and similarly declined. Further news of the vessel's existence arrived from a port at West Africa on the 23rd. By that time the Master had painted out the marks of identification and had altered the vessel's rig.<sup>1</sup> The foregoing facts disclosed that the owners had been completely deprived of the possession of the ship by a peril insured against, namely, the barratry of the Master and crew. By reason of the ship's ultimate arrest such deprivation was not, in fact, permanent.

Branson, J., decided (a) that he ought not to take into consideration the events which had occurred after the notice of abandonment, save as throwing some light on the real question, namely: whether the vessel was at the date of such notice (be it the first or the second notice) unlikely to be recovered by the owners; (b) that it was impossible to find that at the material date there was so little chance of the vessel being ultimately recovered as to make that event unlikely; (c) that though barratry might be analogous to capture, it was only capture followed by condemnation which the cases had decided amounted *per se* to an actual total loss; (d) that the facts did not bring the case within the doctrine of actual total loss (following the decision in *Polurrian S.S. Co., Ltd. v. Young, ante*), nor could they be held to constitute a constructive total loss; and that accordingly the owners could not recover.

It is to be observed, however, that under the law as it stood in England prior to 1906, and under the law (as it is submitted) prevailing in India today, the facts would seem to disclose a sufficient degree of "uncertainty" to entitle the owner to recover as for a constructive total loss.

The two last-mentioned cases may be contrasted with the situation which is depicted in *Société Belge Des Bétons Société Anonyme v. London & Lancashire Insurance Co., Ltd.*, [1938] 2 All E.R. 305. There a number of ships had been confiscated by a so-called Popular Executive Committee which had taken over at least temporary control of the province of Valencia in Spain, during the development of the rising associated with the name of General Franco, against the Republican government of that country. The seizure of the property at risk took place somewhere about September 2, 1936. Notice of abandonment had been given on the 6th of October, as for a total loss. The writ in the action was issued on November 10, 1936. After the seizure, and before the issue of the writ, a decree purporting to expropriate the property had been passed by the *de facto* controlling authority. The court did not decide the

<sup>1</sup> The word "rig" is a comprehensive word, meaning in sailor's language, the way in which a vessel is furnished in the matter of masts, spars, booms, bowsprit, etc.

question whether the consequent loss was an actual or a constructive total loss. It was held, however, that there was a loss by "restraint of peoples"; the judge expressing no opinion as to whether the alternative claim, namely, that the loss was occasioned "by persons taking part in labour disturbances or by riot or civil commotion or from some other malicious act", would also have entitled the plaintiff to succeed.

It is conceived that the courts in India will be guided by the chain of cases which in England has settled that it is the element of "uncertainty" which, in such circumstances, entitles an assured to invoke the doctrine of constructive total loss.

In 1865 a number of early English authorities upon the subject of constructive total loss was considered by a single judge of the High Court at Calcutta in *Gahan v. Owen*, [1865] Bourke O.C. 17. The judgment in that case is extremely short. It contains, however, the following passage: "The plaintiff failed to establish that there was a threatened destruction of the ship, or an absolute temporary deprivation of the ownership of the vessel, or an alienation of the property in her, the thing insured; and proof of the existence of one of these circumstances is necessary to establish a constructive total loss." The expression "threatened destruction of the ship" as one of the circumstances which might entitle an assured to recover as for a constructive total loss, may perhaps mislead the student, unless (which the learned Judge must be presumed to have meant) the threat to the ultimate safety of the vessel be of so grave a nature that those in charge of her would be justified in abandoning her.

The principle now embodied in section 60 (2) (iii) of the English Code was recognized and applied by the High Court of Bombay in *Dwarka Das Lalubhai v. Adam Ali Sultan Ali*, [1867] 3 Bom. H.C.A.C. 1.

An assured may, of course, fail to prove an actual total loss, yet succeed in recovering as for a constructive total loss. In *Captain J.A. Cate's Tug and Wharfage Co., Ltd. v. Franklin Fire Insurance*, [1927] A.C. 698, it was laid down by the Judicial Committee that "the bare fact of a ship being under water or even to be so submerged as to present to her salvors a problem of difficulty, does not amount to an actual total loss and does not therefore relieve an assured from the necessity of proving a constructive total loss".

**Ademption.**—As already stated, by the law of England at any rate before the passing of the Marine Insurance Act, 1906, a loss might, in certain circumstances, change its character from that of a total to a partial loss between the date of the event and the issue of a writ in an action on the policy, claiming for an actual or a constructive total loss. In such circumstances the total loss was said to have been in the meantime "adeemed".<sup>1</sup> The doctrine persisted in spite of the expressed disapproval of Lord Eldon at the beginning of the 19th century. (*Smith v. Robertson*, [1814] 2 Dow. 474.) Much later, indeed within two years of the closing of that century (*Blairmore Sailing Ship Co. v. Macredie*,

<sup>1</sup> The word is borrowed from the English Law relating to testamentary dispositions, where it is used of specific legacies which by the time of the testator's death are found no longer his property, or where events (other than a revocation) have occurred whereby the claims under the Will come to be considered no longer tenable in their entirety, e.g., by a gift *inter vivos* whereby *pro tanto* the bequest has been satisfied. The word originates in the Roman Law. In American Jurisprudence the word is treated as practically synonymous with satisfaction when applied to legacies.

[1898] A.C. 593), a *dictum* of Lord Halsbury suggests that the doctrine of ademption is limited to cases where "capture" had been followed by restoration before action brought. The facts in that case were, however, not well suited as grounds for testing the full extent to which the doctrine might be applied. The ship had foundered in deep water, and after due notice of abandonment, the assured had claimed as for a constructive total loss. Meanwhile, and before the issue of the writ, the underwriters had gratuitously raised the vessel; and in the action (which was tried in Scotland under Scots Law) they pleaded the doctrine of ademption. In the House of Lords, it was held that the test whether a ship had become a constructive total loss was the same in English as in Scots Law, although these laws might differ as regards the date at which the test ought to be applied. It was held, further, that underwriters could not change a constructive total loss into a partial loss by intervening and raising the ship at their own expense. The material words in the advice to the House delivered by Lord Halsbury, in which he touched upon the doctrine of ademption are as follows:—

"I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again . . . . The change of circumstances which in our jurisprudence has been held to turn a total into a partial loss has arisen . . . . in respect of insurances against capture, when to my mind totally different considerations apply."

Anyhow this case is no authority for the suggestion that where the assured has either himself or by his servants or agents brought about a change in the circumstances, the doctrine of ademption will not apply. It was indeed decided so far back as 1867 by a decision never dissented from (*Kidston v. Empire Marine Insurance Co.*, [1867] 2 C.P. 357) and applied three years later in *Lee v. Southern Insurance*, [1870] 5 C.P. 397, that if a total loss, whether actual or constructive be, before action brought, "adeemed" by the acts of the assured or his servants, he cannot recover as for a total loss, though entitled under the "sueing and labouring clause" to be recouped for his expenses in saving or mitigating the damage to the subject-matter of the insurance. Again, in *Roura & Forgas v. Townend*, [1919] 1 K.B. 189, 195 (policy on hull), Roche, J., expressed the opinion (*obiter*) that a restoration of an insured ship between notice of abandonment and the issue of the writ in the action would preclude recovery as for a constructive total loss.

The present English Code is silent upon the doctrine of ademption, and it has not yet been decided in England whether the provisions of the Act are to be read as altering the law in that regard. In a recent case, *Captain J.A. Cale's Tug and Wharfage Co., Ltd. v. Franklin Insurance Co.*, [1927] A.C. 698, 704, the question was treated as still an open one. It is submitted, therefore, that the question will have to be treated as *res integra* in India, where the courts would appear to be unfettered in their approach to the question whether the English, or the Scottish and Continental rule which is followed in the United States of America, should be applied. In the last-named countries it is now well settled that a constructive total loss which has been made the subject of due notice of abandonment fixes and concludes the rights of the parties, subsequent events being regarded as not interfering.

The real jurisprudential question in controversy as between the two views may be thus argued. For the English rule, one may begin with the words of Lord Mansfield in *Hamilton v. Mendes*, [1761] 2 Burr.

1198, 1210) "The plaintiff's demand is for an indemnity. His action then must be founded upon the nature of his damnification as it really was at the time of action brought. It is repugnant, on a contract of indemnity, to recover as for a total loss when the final event has determined that the damnification is in truth an average loss". Lord Halsbury's *dictum* impliedly accepts the doctrine of ademption when the captured vessel is not after all confiscated but returned, yet he thinks "totally different considerations"—unhappily not stated—"to apply", where mechanical skill may contrive to bring a submerged vessel to the surface again. So it may be urged for the English rule that if, before action brought, that which might have been completely lost is, in fact, recovered, although damaged, the doctrine of ademption whereby the totality of the loss is reduced to a partial loss, ought in principle to apply. For example, suppose scientific salvage of the near future to be capable of bringing to the surface within a few hours a vessel which today perhaps could not be raised without operations extending over as many months, or even years, could it be said that anything but an accepted notice of abandonment would entitle an assured on hull to recover as for a total loss? According to those who would uphold the English rule the answer must be in the negative.

For the other view it would seem that the following arguments might be advanced. The material date should be not the date at which litigation begins, but the date of the purported abandonment. "The obligation of abandonment" said Lord Abinger, C.B. (in delivering the judgment of the Court of Exchequer Chamber in *Roux v. Salvador*, [1836] 3 Bing. N.C. 266), "was the necessary consequence of confining the object of the contract to a strict indemnity. If the assured, upon the information he has received, elects to treat the case as one of total loss and to demand the full sum assured, as the thing (if it exists) is vested in him, the very principle of the indemnity requires that he should make a cession of all rights to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, so that the underwriter may be entitled to all the benefits of what may still be of value, and that he may, if he pleases, take measures at his own cost for realising or increasing that value." A valid abandonment operates as a complete and effectual transfer of the property from the assured to the underwriters, who are, by virtue of it, subrogated into the place of the assured. "It has even a retrospective effect, and operates as an assignment of the property not only from the time when it was given, but from the moment of the loss which justified it, so that the underwriters are presumed, to the extent of their respective subscriptions, to have been the owners of the thing insured from the period of the loss."<sup>1</sup>

Assume, then, the case of an unvalued policy. The measure of the indemnity will be the actual value of the ship at the moment when the "property" in her is transferred from the assured to the insurer. In a valued policy, the insurer who thus becomes vested with the property cannot be heard to complain if what, in consequence, has now become his, turns out to be not so valuable as the sum mentioned in the policy. He is concluded by that valuation as the valuation which he has agreed to; and in such a case, is no worse off than a purchaser who has bought

<sup>1</sup> Arnould, 2nd Ed. (1857), Vol. II, p. 1012. Held a correct statement of the law in *Cammell v. Sewell*, [1860] 4 Jur. N.S. 978 affirmed in the Exchequer Chamber 6 Jur. N.S. 918.

a chattel at a price which he afterwards finds was too high. Both are bound by the terms of their respective bargains. Upon this view of the matter, once assume that a notice of abandonment is valid and binding by reason either of acceptance or as having been justifiable in law upon a view of the circumstances, it would seem that any event occurring after such abandonment cannot alter or limit the respective rights of the parties which are to be regarded as conclusively settled with effect from the date of the event which gave rise to the act of abandonment. What then, it may be asked, on that view of the matter, are the rights which arise where, as in *Kidston v. Empire Marine Insurance Co.* cited above, the assured himself after giving notice of abandonment proceeds to salvage the vessel? The answer would appear to be that in the view contended for, the insurer, as the new owner under the valid notice, would be entitled to the benefit of the salvage, though answerable for the costs thereof if he had agreed thereto: the assured, in the work he had undertaken, being regarded as the agent of the insurer, and as holding the salvaged vessel or cargo as a trustee for his principal. In that view, equity would oblige the insurer to give credit for the costs of the salvage by which he had benefited, even were there to be no claim under a "sue and labouring" clause in the policy. There only remains to consider the case where the cost of such salvage might exceed—as it frequently does—the value or agreed value of the repaired or salvaged ship. The facts in the case of the *Yerro Carras* (discussed later upon other matters of interest)<sup>1</sup> disclosed just such a situation. But there the underwriters compromised with the owners under terms which restored the ship to the latter, leaving the owners to deal with all claims for salvage. In the view put forward, the result in the case posed would be that the underwriters would have to bear the loss on balance.

What may be lost.—It is sometimes overlooked by students that what the assured may claim is an indemnity for what he has lost, and that he cannot claim for the loss of something which was not the subject-matter of the interest which he had insured. Upon this principle, that which may be lost is the ship, its cargo, the freight which may be earned, and the profits which may be made. Upon like principles the insured cannot claim for that which he has salvaged. This latter situation fell to be dealt with in India so early as 1867. (*Mitchell v. Gladstone & Ors.*, [1867] 1 Ind. Jur. N.S. 406.) In that case, a ship under towage went aground near Kedgerie in the Calcutta river. Certain portions of her cargo were jettisoned; but one of the ship's officers succeeded in bringing off safely some nine cases of goods, which finally became the subject-matter of a suit in which the plaintiffs claimed to be purchasers of these nine cases at an advertised sale held by Mackenzie Lyall & Co., who, as agents of the underwriters and shipowners, purported to sell the ship *Maharanee* "with spare stores and rigging complete, also the cargo comprising, etc." The point for decision in the case was whether these nine cases were included in the cargo thus put up for sale. It appeared that prior to notice of abandonment they had been taken off the *Maharanee* by an officer of the towing steamer *Dagmar*. They were in perfectly good condition and were still on board the *Dagmar* at the time of sale. It was held that these cases were not part of the cargo abandoned to the underwriters; and in the circumstances might have been sent to their destination, and could not have been validly

<sup>1</sup> See p. 208, *post*.

abandoned; and that, consequently, the property in them had not passed to the insurers and therefore they could not have been validly sold either by the underwriters or their agents.

*Loss of freight.*—Three recent actions in England to recover upon freight policies have produced decisions of great importance.

In *Carras v. London & Scottish Assurance Corporation*, [1936] 1 K.B. 291, the facts were that a Greek steamship the *Yerro Carras* was on her way under charter directing her to proceed to Valparaiso to pick up freight when, in negotiating the celebrated straits of Magellan, she stranded, and four days later, namely, on November the 17th, 1930, was abandoned to the hull underwriters. She was, however, less than a year later, refloated by salvors. The underwriters on hull then compromised for a total loss, but on the basis that the owners retained the ship and accepted liability to the salvors. The owners thereafter surrendered the ship to the salvors in discharge of the latter's claim. In 1932 the salvors sold the ship, as repaired. It was agreed that the actual value of the ship when so repaired was £13,000. The cost of effecting those repairs had actually exceeded that sum; but such cost was, however, less than the insured value of the ship which was expressed in the policy to be £30,000. The policy contained two of the Institute voyage clauses (Freight). These were clauses 4 and 5 reading as follows:—

"4. In the event of the total loss, whether absolute or constructive, of the vessel the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast chartered or unchartered."

"5. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or the wreck shall be taken into account."

The owners sued the underwriters for a total or a constructive total loss of freight.

It was held unanimously by the Court of Appeal, reversing the decision of Porter, J., that there was an actual total loss of freight, and therefore that the freight underwriters were liable. The decision was grounded upon a finding that the ship could not "make" the cancelling date or be tendered according to contract to the charterers at Valparaiso. The Court upheld the doctrine that there is an actual loss of freight where the ship has become so damaged as to be incapable of performing the voyage for which freight could be earned, or is so damaged that to repair her for such a voyage would cost more than a prudent man would incur. The Court, further, held that the expression "constructive total loss" is misleading, if applied to a loss of freight; and not the less so that the test where there is no actual total loss of freight would be analogous to that applicable to a ship-policy in deciding whether there has been a constructive total loss of the vessel.

The case of the *Yerro Carras* was decided in 1935 and was considered by the same Court (though somewhat differently constituted) less than six months later, in the case of a steamship named *Mount Taygetus Kulukundis v. Norwich Union Fire, etc.*, [1936] 2 All E.R. 242. The case turned for the most part on findings of fact; but the doctrines of law which it lays down are firstly, that owners are deemed to be "prevented in a business sense" from performing the freight contract by perils of the sea where no prudent man, if uninsured, would incur the expense of repairing the ship so as to make it possible to complete the

contracted voyage; secondly, that the proper cost of repairs to be taken into consideration is the cost of such temporary repairs as would enable the ship to complete the contracted voyage, and not the cost of permanent reparation; and, thirdly (*per* Greene, L.J.), in estimating the repaired value of the ship and the general average contribution by cargo, the correct values to take are those at the time of the accident and not those when the ship, as salvaged, finally arrives at her destination.

In *Petros M. Nomikos, Ltd. v. Robertson*, [1938] 2 K.B. 603, the Court of Appeal had to adjudicate upon the effect of the same Institute Time-clauses as had fallen to be considered in *Carras v. London and Scottish Assurance Corporation* (*supra*), but in somewhat different circumstances. The clauses numbered 4 and 5 in the *Carras* policy were numbered 5 and 6 in the *Petros Nomikos* policy. The plaintiffs were shipowners who had chartered a steamer to carry a cargo of oil from Venezuela to the United Kingdom. The vessel went into a port for certain repairs and while there, was seriously damaged by an explosion followed by fire. The plaintiffs had taken out a number of policies in respect of the hull and machinery, wherein the steamer was valued at £28,000. The policies were for 12 months as from the 20th July, 1936. On the same date as the other policies and for a like period, plaintiffs took out a Lloyd's policy on freight, chartered or otherwise. The estimate of consequential repairs amounted to £37,400. When repaired she was considered to be worth £45,000. On this view of the matter the plaintiffs did not exercise their option to abandon her to the hull underwriters, but repaired the vessel themselves at the estimated cost, and then claimed and were paid by the hull underwriters as for a partial loss. Meanwhile, however, the charterparty could not be performed and the plaintiffs lost the freight payable thereunder. They therefore claimed against the freight underwriters, but their claim was refused. It was contended for the defendants in the action brought to enforce the claim that by clause 5 (corresponding to clause 4 in the *Carras* Case, *supra*) they were not liable except in the event of a total loss, and that the ship had neither been an absolute nor a constructive total loss. They also relied on clause 8 in their policy which was expressed in the form of a warranty and read as follows:—

"Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise".

Goddard, J., who tried the action accepted the defendant's argument that there having, admittedly, been neither an abandonment nor a notice of abandonment, there could be no constructive total loss and it was nobody's case that there had been an absolute total loss, and he gave judgment for the freight underwriters.

The Court of Appeal (Green, Mackinnon, and Slesser, L.J.J.) unanimously allowed the appeal. Their decision turned entirely upon the meaning to be placed upon the seven words in clause 5 of the Institute Time-clause, "The constructive total loss of the steamer". "The truth is," said Mackinnon, L.J., at p. 624, "that 'loss' is a word of double import. It may mean, objectively, the disaster that has befallen the subject-matter of insurance; or it may mean from the underwriter's point of view, the claim that is payable on the policy—that which the underwriter has to enter in his loss book. In the first sense, disaster to the ship, constructive total loss means the ship being so damaged that the cost of repair will exceed her repaired value; in the second sense, claim recoverable, it no doubt means that *plus* notice of abandonment."

(On the admitted facts the repaired value having, by virtue of clause 6, to be considered the value of the ship as stated in the policy on hull and machinery, that sum was definitely ascertained at £28,000. Consequently, as the cost of repairing her was £37,400, the ship was a constructive total loss within the definition in section 60 (2) (ii) of the Act. That being so, there was no necessity to invoke the doctrine of abandonment and the absence of any notice of abandonment did not arise. Greer, L.J. (at p. 620), without finally deciding the point, expressed himself as inclined to hold that abandonment and notice of abandonment are not part of the definition of constructive total loss, but are conditions subsequent which have to be performed before a claim can be made against underwriters on ship or goods. The Lord Justice, for his part, regarded the case as falling to be decided upon the precise agreement between the freight underwriters and the plaintiffs, which did not (as it might have done) import as a condition precedent that there should, in fact, have been a claim made or met under any other policy as for an absolute or constructive total loss. Mackinnon, L.J., at p. 628, answered the underwriter's contention as to the effect of the warranty expressed in clause 8 thus: "Such a clause," he said, "will bar any claim whenever it is necessary for the assured to assert the lapse of time as one of the facts establishing his cause of action. In this case, the assured is under no such necessity. . . . . To a claim under clause 5 the provision in clause 8 can have no application. . . . . clause 5 is an added promise to pay total loss if either of two events happened. To that added promise, where one of the two events is proved to have happened, I think clause 8 can have no application. The claim is, in no conceivable sense, 'consequent upon loss of time'. It is simply a claim for a payment which is promised on a certain event by reason of the happening of that event."

### 11. "Honour" Policies.

For a discussion of so-called "honour" policies (which include policies containing such a stipulation as "interest or no interest") the reader is referred to Chapter III of this treatise.<sup>1</sup>

### 12. Assignment.

The law in India relating to assignment of policies of insurance is discussed in Chapter III of this treatise and to the relevant passages therein the reader is therefore referred.<sup>2</sup>

### 13. Subrogation.

The doctrine of subrogation has been explained in Chapter III of this treatise<sup>3</sup>; and it is thought that the present chapter has afforded as many examples of its application to contracts of marine insurance as are compatible with the scale of this work.

<sup>1</sup> See pp. 69-72, *ante*.

<sup>2</sup> See pp. 72-77, *ante*.

<sup>3</sup> See pp. 82-86, *ante*.

*14. Measure of Indemnity.*

The expression "measure of indemnity" is borrowed from the English Code. The late Mr. Arthur Cohen, the author of the article on *Marine Insurance* which appeared in the original edition of Lord Halsbury's *Laws of England*, preferred a longer though perhaps more strictly accurate description of this topic, which he styled "The measure of the loss for which insurers are liable". Cohen's definition will serve to remind the student that though marine insurance aims at obtaining from the insurer a perfect indemnity for the loss which has been occasioned to the assured, in practice that aim is not always achieved.

Following *Irving v. Manning*, [1847] 1 H.L., pp. 287, 305, 307, the English Code<sup>1</sup> provides that if the policy be a valued policy the measure of indemnity is the sum fixed by the instrument: while in the case of an unvalued policy the corresponding measure is the insurable value of the subject-matter insured.

The English Code enacts a number of principles for guidance in determining the value of the subject-matter of the insurance at the material date, and discriminates, as it must, between principles of valuation suitable in the case of claims made in respect of a vessel and of those concerning her cargo. It also, as it must, distinguishes principles applicable to cases of a total and those applicable to a partial loss. If a vessel or any part of her cargo is surveyed for the purpose of any such valuation, the surveyor's opinion, as expressed in money, may be criticized in an action upon an unvalued policy, to see whether the principles which have been applied are, as a matter of law, correct. When a question of contribution arises between several persons having separate interests in the result of the accident to ship or cargo, then the Average Adjuster is called in. The work of adjustment may be in London or at that port where the voyage ends, or perhaps in Glasgow or Marseilles—if one or other of those ports be the place at which the venture has been broken up by consent or necessity, or because the vessel is there registered. In India, up to the time of writing, there are no Average Adjusters. Nor indeed are there any in Burma or in Ceylon. Accordingly, though such a course would not at all be convenient were disputes arising upon policies of marine insurance to increase in India, the practice appears to be to agree that adjustment shall be made in London. In Burma the present practice is said to be to have adjustments made at the place where the ship is registered, unless the policy otherwise provides. An increasing number of policies expressly attract for purposes of adjustment some foreign statement of average properly obtained at a foreign port, or, as expressly, attract the York-Antwerp Rules.<sup>2</sup>

It is thought that the statement of the principles above alluded to which have been enacted in sections 69 to 72 of the English Code, derived as they are from the settled case-law in England, may be accepted by the courts in India as applicable to valuations made in this country for the purpose of determining the measure of the indemnity. They are accordingly set out hereunder in the language of the relative statute.

"69. *Partial loss of ship*.—Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

<sup>1</sup> Sec. 68.

<sup>2</sup> Printed as Appendix V to this treatise.

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage computed as above."

"70. *Partial loss of freight.*—Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value, in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy."

"71. *Partial loss of goods, merchandise, etc.*—Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss.

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.

(4) 'Gross value' means the wholesale price, or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. 'Gross proceeds' means the actual price obtained at a sale where all charges on sale are paid by the sellers."

"72 *Apportionment of valuation.*—(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole ascertained in both cases as provided by this Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over

the net arrived sound values of the different species, qualities, or descriptions of goods."

"New for Old."—In estimating the value of a repaired vessel where the ship at the time of the accident was not completely new or at any rate was more than one year old, it was formerly the custom to agree to a deduction, arrived at by a mere convention, so as to avoid the ship-owner getting not only compensation for the supposed loss or damage, but possibly a ship all the better for the accident. The convention arrived at, and which has been for a very long time in use where wooden ships are concerned, admitted the deduction of one-third of the whole expense, i.e., including materials and labour. The effect of such deduction is that the estimated damage stands at the remaining two-thirds. This is known in the law relating to shipping and in shipping circles as deducting "one-third, new for old". This custom was recognized as far back as *Da Costa v. Neunham*, [1788] 2 Term. R. 407. An Indian case (*Apcar v. Howah Bye*, [1866] 1 Ind. Jur. N.S. 237) upon a policy on the ship "*Speedy*" (taken out with the Reliance Marine Insurance Office in 1858) provides an early instance of the recognition in India of the custom to allow "one-third, new for old" in assessing damages in certain cases. The policy expressly attracted the practice of Lloyd's. The ship was wrecked in a cyclone on the 5th October, 1864, and the plaintiff claimed for a constructive total loss, it having turned out that she was not worth repairing. The Court of first instance held that there was no proof of a constructive total loss or of any due notice of abandonment. The damage was estimated at Rs.63,000, no deduction of one-third "new for old" being made, on the ground that the ship had in fact never been repaired.

The rule is anyhow quite unsuitable for steamships and, in fact, it is usual now-a-days to provide against its application, except so far as concerns such parts of a modern steamship and of her equipment as correspond to what was to be found in a wooden ship. A common provision to that end is a clause running "no thirds to be deducted except as regards hemp rigging and ropes, sails, and wooden deck".

### 15. Liabilities to Third Parties.

For some time past insurance against liabilities to third parties has been common in marine insurance. Since the case of the *Niobe*, [1891] A.C. 401 (a case of collision), the measure of indemnity has been regarded as the amount actually paid by the assured, or which is legally payable by him in respect of third-party claims. Such a liability, to be covered at all, must either be the subject of a separate policy or of a special clause, and be regarded as a separate and distinct agreement, although included in a policy covering other kinds of risk. In *Joyce v. Kennard*, [1871] 7 Q.B. 78, it was the liability of a lighterman, while in *Cunard Steamship Co. v. Marten*, [1902] 2 K.B. 624, it was the liability of a carrier which was at risk.

Since 1836 (*De Vaux v. Salvador*, [1836] 4 Ad. & El. 420, which was the case of an ordinary marine policy), it became settled that an insurer was not liable for any balance which one ship might have to pay the other where both were to blame for the collision. This is but to apply the maxim *in pari delicto potior est conditio defendentis*.<sup>1</sup>

<sup>1</sup> When equally in the wrong, the defendant is in the stronger position.

In consequence of this decision special running-down clauses were introduced, but have from time to time been altered. In the result underwriters are now-a-days liable under the ordinary policy for injury caused to the assured ship by collision. The English Code lays down the measure of indemnity in such cases, in conformity with the law as above stated, and as to be deduced from the authorities, in section 74 of the Statute. A specimen of a modern running-down clause has been discussed earlier in this chapter.<sup>1</sup>

## 16. General Average Contribution and Salvage charges.

The principles of the law of India relating to the circumstances under which a right to contribution arises have been the subject of description and discussion in Chapter III of this treatise.<sup>2</sup> So too, more than one reference has been made in the present chapter to the York-Antwerp Rules as governing the adjustment of general average. The topic of contribution, in the larger sense, belongs in reality to that branch of the law maritime which directly concerns shipping and navigation. For a detailed study of the topic, therefore, the reader is referred to the standard works upon the subject.<sup>3</sup> It is only to a limited extent that an underwriter becomes liable in respect of general average at all.<sup>4</sup> The insurer only takes upon himself whatever he has by his policy agreed to shoulder of those burdens which properly fall upon the assured, and which rank as general average liabilities.

The English Code consolidates the principles whereby general average costs, expenses and salvage charges become deductions from the insured value in order to arrive at a figure for which a given insurer is liable by way of contribution. The relative section of the Statute is section 73 and is in the following terms:—

“73. *General average contributions and salvage charges.*—(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution if the subject-matter liable to contribution is insured for its full contributory value; but if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under-insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.”

It has been pointed out that the contributory value and the insurable value may obviously be different, inasmuch as the former is generally the value at the port of adjustment, whereas the latter is the value at the commencement of the voyage: the statutory rule above cited providing for the case where such difference exists. (See *Balmoral Steamship Co. v. Marten*, [1901] 2 K.B. 896, affirmed on appeal [1902] A.C. 511.)

<sup>1</sup> See p. 182, *ante*.

<sup>2</sup> See pp. 65, 66, *ante*.

<sup>3</sup> E.g., *Carver's Carriage by Sea* (1917) and *Kennedy's Law of Civil Salvage*.

<sup>4</sup> See the discussion of this topic on pp. 103-106, *ante*.

17. *Salvage.*

Salvage is a topic of no small importance in maritime law. It is only of incidental importance in the law relating to marine insurance. The word is used of the work which is done by persons outside the interests concerned in the ship or its cargo towards saving the ship or cargo, or in the direction of preventing further loss or damage to the same than may already have occurred. The word is also used of the remuneration which is paid to persons, other than the owners or charterers of a ship and who are also outside any contract of carriage in relation to the ship or cargo, for work rendered of the character described. Salvage of this nature carries with it a right to reward, and that right is regarded as something independent of contract.<sup>1</sup> The law distinguishes between salvage properly so called, the nature of which is described above, and services in the nature of salvage. In common parlance and as used in the English Code the word "salvage" and services in the nature of salvage have reference to the saving of property. The duty of saving life, which is cast upon the shipowner and his servants, is the creature of more or less recent statutes. Expenses incidental to its performance are not recoverable under the general words of an ordinary marine policy, but must be made the subject of separate insurance.

The place of salvage in the maritime law is thus dealt with in *Falcke v. Scottish Imperial Insurance Co.*, [1886] 34 Ch.D. 234, 248: "With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman Law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved<sup>2</sup>—a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances." Salvage rendered by His Majesty's ships<sup>3</sup> is to a large extent regulated by special statute.

As to how salvage charges paid, or expenses in the nature of salvage incurred, can be recovered, the English Code provides that "salvage charges" do not include the expenses of services in the nature of salvage rendered by the assured or his agent or by any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they are incurred. Subject, however, to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.<sup>4</sup>

<sup>1</sup> In so saying the writer is following the definition of Salvage Charges which appears in Sec. 65 (2) of the English Code. That definition is, strictly speaking, accurate only if we are to understand the words in the definition "recoverable under maritime law by a salvor independently of contract" to mean independently of any common law contract. For maritime law places the salvor and those for whom he has worked in a contractual relationship analogous to that which arose under the Roman Law contract *negotiorum gestorum*.

<sup>2</sup> The student will note that the liability falls upon "the thing", giving a right of action *in rem*, i.e., against "the thing".

<sup>3</sup> I.e., by the Navy. See the Merchant Shipping Act, [1894] (57 & 58 Vict., c. 60) and the Merchant Shipping Salvage Act, [1916] (8 & 7 Geo. V., c. 41).

<sup>4</sup> Sec. 65 (1).

## 18. Under-Insurance.

The effect of under-insurance is thus dealt with in the English Code, where the relative section is section 81:—

“Where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.”

The above gives statutory validity to principles which have been accepted in Scotland as well as in England: see *Whitworth Bros. v. Shepherd*, [1884] 12 Ct. of Sess. Cas. (4th Ser.) 204; *Western Assurance Co. v. Poole*, [1903] 1 K.B. 376; *The Commonwealth*, [1907] p. 216. Cf. *Anglo-Californian Bank v. London & Provincial Marine & General Insurance Co.*, [1904] 10 Com. Cas. 1, 8 and 9. (*The Welsh Girl*.)

## 19. Return of premium.

The principles governing the return of premium in the law relating to insurance have already been summarised in an earlier chapter of this treatise and to that summary the reader is referred.<sup>1</sup> The premium may be returnable under some express term of the contract or may become so by operation of law. It is submitted that the Courts in India will follow the principle laid down in *Tanjore Life Assurance Co. v. Kuppanna Rao*, [1920] 43 Mad. 333, wherein it was stated that in general there are three classes of cases in which the assured can claim refund of the premium. The English Code puts the matter as follows, and in so doing illustrates and to some extent amplifies what the High Court at Madras in the case cited had stated:—

“84. (1) Where the consideration for the payment of the premium totally fails and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.”

(The foregoing sub-section of section 84 of the English Code introduces the equitable doctrine that he who asks equity must do equity.)

“(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.”

It follows, however, that if the risk run is not apportionable and has attached, the premium is not returnable. So, too, if the subject-matter has been insured “lost or not lost” and has arrived in safety at the time when the contract is concluded (in the sense of being properly executed), there is no failure of consideration, and the insurer has taken upon himself the special risk of the property being lost before the last-mentioned date. But the premium is not returnable, unless at the time the contract was finally being executed, the insurer knew of the safe arrival. (*Bradford v. Symondson*, [1881] 7 Q.B.D. 456.)

The English rule in the case of double insurance (where the risk under some of the policies attaches earlier than the risk under the later

<sup>1</sup> See Chapter III, p. 81, ante.

instruments so that under the earlier ones the entire risk is run for a time) is that the premium is only returnable by the underwriters of the later policies. (*Fisk v. Masterman*, [1841] 8 M. & W. 165.)

*Return on reduction of risk.*—In some cases premiums are made payable subject to reductions in specified eventualities. Where the eventuality contemplated in fact arises, some balance of the original premium paid is returnable; and, in strictness, the insurer holds that balance as a trustee for the assured and is bound to return it to him. In modern practice, however, it is treated as a mere matter of accounting between the parties, such returns being dealt with as if they were losses or averages. The reader will remember from what has been stated earlier in this chapter, that in marine insurance the insurer looks to the broker for payment of the premium, and, in modern usage, he credits the broker with payment of it in his books. So, on a claim arising, any part of the premium returnable for the reasons stated is added to whatever other liabilities the insurer has to meet under the policy.

## 20. Settlement of losses.

On the authorities from *Xenos v. Wickham*, [1863] 14 C.B. (N.S.) 435, 464 to *Legge v. Byas, Mosley & Co.*, [1901] 18 T.L.R. 137; 7 Com. Cas. 16, a broker who has effected the insurance and is still in possession of the policy has ostensible authority both to settle the loss and to receive payment on behalf of the assured.<sup>1</sup> Even so, it seems that the insurer remains directly responsible to the assured both for the amount payable in respect of losses and in respect of returnable premiums. (*Universo Insurance Co. of Milan v. Merchants Marine Insurance Co.*, [1897] 2 Q.B. 93, 97, 98.) But from very early times the Courts in England would not admit that the broker had any authority to bind the assured by a mere settlement of loss arrived at on an account between him (the broker) and the underwriter. (*Jell v. Pratt*, [1817] 2 Stark 67.) Thus the only settlement which could bind the principal would be one independent of any running account between the broker and the insurer, such as is customary in the City of London.

There is an usage of Lloyd's whereby sums due in respect of losses are payable seven days after settlement. Such an usage, whereby the broker only receives payment on a running account between himself and the Lloyd's underwriters once a quarter, cannot bind his principal unless it be shown that the principal was aware of the usage and had agreed to it. It was said in *Bartlett v. Penland*, [1830] 10 B. & C. 760, 770, that where the principal had expressly instructed the broker to effect the insurance with Lloyd's, the inference might be drawn that he had consented to be bound by Lloyd's usages. But manifestly such an inference may be rebutted. Where, however, there is no such custom or usage, or where, even in the case of a policy effected with Lloyd's underwriters, the assured cannot be shown to be cognizant of it, the assured may sue the underwriters. In cases where the broker has, under the custom, received the money and given a sufficient discharge to the insurer, the assured's remedy is against the broker for "money had and received to the use" of his principal. There appears to be no such custom in India, even when the insurance is effected with local agents of Lloyd's underwriters.

<sup>1</sup> This is English commercial practice. It is otherwise in India (see p. 213, post).

Accordingly payment of losses is due from the insurer to the assured so soon as the claim is admitted or is agreed pursuant to adjustment, and it is said that payments are effected with promptitude.

## 21. Broker's lien.

In general an assured is entitled not only to receive but to retain the policy, and not the less so that a broker may have paid the premium on it. In marine insurance, according to English commercial practice, the broker is frequently in possession of the instrument; and if in fact he has such possession, he may exercise his *lien* upon it and hold the instrument against his principal for so long as the latter shall not have repaid any sum in respect of premium which the broker may have paid to the insurer, or be in debt to him in respect of any other charges. The *lien* itself arises by operation of law and has been recognised since at any rate *Fisher v. Smith*, [1878] 4 A.C. 1. It is the subject of express provision in the English Code of 1906.<sup>1</sup> A broker's right in the matter of *lien* may, of course, be limited by express agreement, as in *Fairfield Shipbuilding Co. v. Gardner*, [1911] 27 T.L.R. 281.

## 22. Commercial usage in India.

Policies of marine insurance issued in India may well attract matters of practice amounting to commercial usage or custom of which the courts must take notice as in many ways affecting the rights of parties. Examples of differences between English and Indian commercial practice are the following:—

**The Broker.**—Though the term “broker” is still freely used of intermediaries who introduce business upon a commission basis, many who so employ themselves are regarded as mere canvassers. It would not be true in the great majority of cases today in India to say that these gentlemen are treated as acting for the insurer. On the contrary, they are the agents of insurers. Again, it is the insurer in India who in the majority of cases of marine insurance collects the premium. In consequence the recognition which obtains in the port of London of the broker's *lien* on the instrument is already something foreign to the world of marine insurance in India.

**The Slip.**—Largely because the part played by the broker in India is so different from that allotted to his counterpart in London, there is in India no necessity for the document known as the “slip” as the same is understood at Lloyd's. Once the business has come his way, the ordinary underwriter in India is prepared at once to issue a cover-note for the purpose of affording *ad interim* protection to the insurer. The broker has no assigned place in this transaction.

**Days of Grace.**—Except in life insurance business, the practice of allowing with any strictness so many days of grace for the payment of premium seems to be nearly obsolete, if it ever was general in India. The habits of the people and the nature of competitive trading has led to quite a different practice in the matter of credit: most insurers regarding themselves as at liberty to grant time for the payment of premium in accordance with their own judgment of the character and standing of any given assured. In many policies, e.g., the one chosen for particular

<sup>1</sup> *Id.* sec. 53.

examination in the text of the present chapter, the consideration is expressed to be not the payment of, but the promise to pay, the sum stated as premium; and the custom of allowing an undefined period within which to pay perhaps not only the first but subsequent premiums, would strongly suggest that in the majority of cases a sanction founded upon non-payment of premium could not be relied upon: that, in short, any such condition would, in such circumstances, appear to have been waived.

### 23. *Mutual Insurance.*

To the facts that India has no ship-building industry in a modern sense and that all but a negligible quantity of her overseas trade, export as well as import, is carried in foreign bottoms, is to be attributed the absence of those mutual associations or clubs which, in England, bore at one time a substantial part of the losses incidental to marine perils: and did so upon principles which brought them within the law relating to marine insurance. They date from the 18th century, and after a somewhat chequered career are now firmly established as part of the nation's recognised machinery in aid of the country's trade and commerce. They exist primarily for shipowners, and in order to cover risks which are less easy or more expensive to cover in the ordinary market. Some such associations concern themselves solely with insurance on freight.<sup>1</sup> *Mutual insurance companies exist in India and are controlled by the Insurance Act, 1938.* But the objects of these local associations relate to personal and not to commercial insurance.

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<sup>1</sup> For a description and discussion of these associations in Great Britain, see Arnould, *op. cit.*, 11th Ed., Vol. I, pp. 111-123.

## CHAPTER V

### FIRE INSURANCE

1. Preliminary. 2. Nature of the Contract. 3. What may be covered:—The subject of insurance—Fire Brigades—The subject-matter of Insurance. 4. How cover is effected:—Effect of the Indian Stamp Act. 5. Duration of the Risk:—Revived or renewed policies. 6. Insurable interest:—Preliminary—Sale of Goods—Interest in immoveable property—Defeasible interests—Consignees—Wharfingers, warehousemen, etc.—Interest by virtue of entrustment—Shebaitis, Mohunts and Mutwallis—Manufacturers—Rents, profits and shares—Statement of interest—Bottomry and *Respondentia*. 7. Description:—Locality—Goods: genus and species—Misdescription and no misdescription—Ownership. 8. Disclosure. 9. Alteration of risk. 10. The Premium. 11. The Policy:—Lightning—The Indemnity. 12. The Conditions. 13. Double and over-insurance. 14. Assignment. 15. Forfeiture. 16. What is recoverable:—Stock-in-trade—Goods in process of manufacture—Articles in use—Buildings—Assessment of damage done. 17. Subrogation and Contribution.

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#### 1. Preliminary.

The present chapter, though concerned with contracts of fire insurance properly so-called, will inevitably make mention of doctrines and principles which have been already discussed earlier in this treatise. Among such may be mentioned what has elsewhere been dealt with under Average, Guarantee, Indemnity, *Uberrima Fides*, Insurable Interest, Misrepresentation, Breach of Warranty, Fraud, Mistake, Subrogation and Contribution. The student will remember that the doctrines and principles which fell to be considered under the above-mentioned topics apply to non-marine as to marine insurance; and that where a situation arises under a contract of non-marine insurance not covered by direct authority in a non-marine case, recourse may be had to decisions in cases of marine insurance where a similar point has been adjudicated upon.

#### 2. Nature of the Contract.

A contract of fire insurance has, in most instances, for its object, the provision of compensation for the destruction of or damage to property by fire. As in the case of all other contracts, the parties to it must be capable of contracting,<sup>1</sup> the object to be served must be

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<sup>1</sup> The topic of capacity, allied as it is to competence, has been dealt with in Chapter II (pp. 18-25, ante). It is thought outside the scope of this treatise to enlarge further on the subject. The question of a minor's right under a fire policy arose in *Great American Insurance Co. Ltd. v. Madanlal Sonulal*, [1935] 5 Comp. Cas. 352, where the policy had been entered into by the guardian of the minor's person and property recognised by his personal law. It was established that the insurers knew that it was the minor's property which was the subject-matter of the insurance.

lawful,<sup>1</sup> and there must be sufficient consideration to support the reciprocal promises. In common with all other contracts of insurance it is governed by the doctrine of *uberrima fides*.<sup>2</sup> The insurers are subrogated to any rights which the assured may enjoy in diminution of the actual loss which he might otherwise sustain; and where there are more insurers than one, contracting with the same assured in respect of the same subject-matter (unless the terms of any particular policy otherwise provide) the principle of contribution applies. Likewise, it is as essential in fire as in all other classes of insurance, that the assured should have an insurable interest in the property at risk.

As the object to be achieved by the contract is compensation for destruction or damage, the ideal contract would be one providing a complete indemnity; for which reason it is sometimes said that a contract of fire insurance is one of indemnity. *Prima facie*, that is correct; but, in practice, the contract may, strictly speaking, fall short of an indemnity. In some cases where the property at risk admits of such treatment, repair or reconstruction may take the place of monetary compensation. Where property is reconditioned or repaired it is said in the language of insurance business to be "re-instated". Again, the terms of the contract may expressly admit of exchange; and where this is so, a proper exchange will satisfy the claim. It should be noted, however, that neither reinstatement nor exchange can, apart from apt words in the contract providing for such means of indemnification, be adopted by the insurers without the express consent of the assured to be so satisfied. In general, therefore, the claim must be met by a money payment. Money means cash, unless the policy by express terms otherwise provides, when, if allowed by those terms, insurers may meet the claim by bills of exchange or even by promissory notes. Upon the principle of indemnity, indeed, there is no limit to what the assured may choose to accept in discharge of the insurer's liability, and they are their own judges as to the form in which they will take it. As Bramwell, B., said in *Times Fire Assurance Co. v. Hawke*, [1858] 28 L.J. Ex. 317, 318, "As between the company

On a plea that the minor's disability to enter into a contract rendered it void, the court held the insurers bound under the Contract Act and allowed the plaintiff to recover.

The student will realise that included in the notion of capacity, when applied to corporations, is that of the latter's powers. In a recent case, a transit policy had been altered by endorsement so as to cover risk against fire while in transit or storage. The property consisted of wool, which was destroyed by fire during the currency of the policy. One of the insurers was a British company in process of being wound up when the claim was made. The assured sought to prove for his loss in the winding-up proceedings. It was then found that, by the company's memorandum, fire insurance was excluded from its objects. It was accordingly held that the policy, being in substance a fire policy, was *ultra vires* the insurers; and therefore the proof of the assured could not be admitted. (*In re Argonaut Marine Insurance Co.*, [1932] 2 Comp. Cas. 434.)

<sup>1</sup> Contracts void at law on the ground of illegality have been dealt with in Chapter II (pp. 26-29, *ante*), and to that the reader is referred. It has been held in Canada in *Bruneau v. La Liberté*, [1902] 19 Q.R.S.C. 45; *Dominion Fire Insurance Co. v. Nikata*, [1915] 52 Can. S.C.R. 294; that a fire policy upon a brothel was void for illegality. In most parts of India the courts might not go so far, since brothels are in many parts actually licensed. Presumably the insurance of an unlicensed brothel would be at least tainted with illegality, and probably held void as against public policy.

<sup>2</sup> It has always been well-settled that included in the circumstances which an assured must disclose to those with whom he is negotiating for a fire policy are threats of arson or even rumours of such threats. This doctrine was upheld in India and applied in the case of *Imperial Pressing Co. v. British Crown Assurance Corporation Ltd.*, [1914] 41 Cal. 581, and the non-disclosure of such threats was held to disentitle the plaintiff to succeed.

and the assured the contract was one of Indemnity and they might have agreed to take a wall, or a load of barley, in satisfaction." But this right in the assured does not invest an agent authorised to collect payment from the insurers with any implied authority to accept on behalf of his principal anything but cash. (*Sweeting v. Pearce*, [1861] 9 C.B. (N.S.) 534.) A cheque, though in contemplation of law a bill of exchange, will, if duly honoured, be regarded as payment in cash: *The Netherholme, Hine v. Steamship Insurance Syndicate*, [1896] 72 L.T. 79, 82 C.A. The last case also decides that there is no discharge of the insurer's liability until the proceeds of a cheque or other bill of exchange shall have reached the hands of the assured.

As already pointed out, however, the contract may often fall short of a complete indemnity. It may, indeed, manifestly aim far below that ideal. In many instances, the property at risk is essentially invaluable. In others, the assured cannot afford to pay more than a certain sum by way of premium, and that sum may be insufficient to secure anything like a complete indemnity. As a matter of practice, some amount of business upon so-called "valued" policies is entered into upon the footing that no matter what the resulting loss may be, the assured agrees that he cannot get under any circumstances more than what he claims under the policy though the stated value of the property at risk may be little better than the subject of a guess.

### 3. What may be covered.

The layman or the student reading insurance law for the first time will find the verb "to cover" used in more than one sense. Sometimes it is said that the assured is "covered" between one date and another; as often it is the risk which is "covered"; and quite as frequently a building or a chattel is being "covered" by the insurance effected. In strictness, what is "covered" by the insurance is the risk to which the property wherein the assured has an interest, is exposed. The interest in the case of fire insurance is that the property concerned shall not be destroyed or damaged by fire. Thus, the student must distinguish between the "subject of insurance", which is the peril insured against, and the "subject-matter of insurance", which is the property exposed.

**The subject of insurance.**—It is the risk of destruction or damage by fire which has now to be discussed and explained. Many of the old questions as to the degree of risk covered by a contract of fire insurance are today little more than subjects of academic interest. The experience of nearly 200 years of fire insurance business the world over has resulted in so large a measure of standardization of policies,<sup>1</sup> that few questions now-a-days arise otherwise than upon a construction of one or more of the terms contained in the written instrument. The risk, then, as already stated, is one attendant upon fire. This, however, needs explanation. "Fire," in the law relating to insurance, involves ignition. The raising of temperature in something which is the subject-matter of insurance is not "fire". To use another word, "combustion" is an essential feature. Yet, combustion, *per se*, is not enough. "Fire", as a peril insured against, means the combustion of something which ought not to have ignited, and which would not have done so but for some circumstance

<sup>1</sup> Indian policies often adopt British as well as local standard conditions. The printed conditions in general use by tariff companies are known as the "Uniform Policy Conditions (Foreign)".

introducing the element of accident<sup>1</sup> as one of the predisposing influences to the damage done. Thus, things intended to burn in the place where they ought to burn, e.g., coal or wood on a domestic hearth, in the furnace of an engine, weeds or other refuse smouldering in the garden, the fuel in a domestic stove, or the combustion by which a candle or a gas-jet illumines domestic premises, are not within the perils insured against. On the other hand, the same elements in a state of combustion, when misplaced, are eminently within the scope of such insurance. Once burning embers fall from the grate on to a carpet, or are blown from the furnace of a locomotive engine on to the thatched roof of a building; or, by a like agency, when burning refuse is borne on the wind into a domestic building or a store-house, the situation created is precisely within the perils sought to be provided against by a policy of fire insurance.

It is also important to note that the risk ordinarily insured against under the words "by fire" is not confined to damage to property which actually catches fire. Thus, loss occasioned by cracking, scorching, or any form of disintegration, such as melting, is, unless expressly excepted by the terms of the policy, always recoverable when damage of this character is the result of something else catching fire which in the ordinary course of events should not have caught fire. On the other hand, property which may become scorched or otherwise damaged by proximity to a domestic fire maintained in the usual way, and in the recognised place for such a fire, will not be within the policy. Upon these principles, the melting of ice in a store-house has been held in Canada to be a loss by fire. (*North British and Mercantile Insurance Co. v. McLellan*, [1891] 21 Can. S.C.R. 288.) For the same reason, damage occasioned by measures reasonably pursued for extinguishing or minimising the spread of a fire, or for saving property endangered by the conflagration are regarded as damage done "by fire". Thus, damage by water used towards extinguishing the flames, by rain falling on salvaged property after its removal from the endangered premises, or by masonry falling upon insured property as the result of the disintegration of the premises during the conflagration, are all to be regarded as damage "by fire".

The risk insured against includes all loss caused by fire irrespective of the place where the fire originated. (*Walker v. London and Provincial Insurance Co.*, [1888] 22 L.R.Ir. 572, 575.) In *Stanley v. Western Insurance Co.*, [1868] 3 Ex. 71, the doctrine was thus broadly stated by Kelly, C.B., at p. 74: "Any loss resulting from an apparently necessary and *bona fide* effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles or furniture out of the window, or even the destroying of a neighbour's house by an explosion for the purpose of checking the progress of the flames; in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy." This *dictum* was expressly approved by Gorell Barnes, J., in *Knight of St. Michael*, [1898] P. 30. As pointed out by the Court of Appeal in *Re Etherington & Lancashire & Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, a proximate cause need not necessarily be the last event in the chain of causation. (*Samuel (P) & Co. v. Dumas*, [1924] A.C. 431.) The chain must begin with fire in the sense contemplated by the law of fire insurance, and what follows and finally culminates in the damage for which claim is made, must, in the natural course of events,

<sup>1</sup> "Accident", in this context, means anything fortuitous, in the sense of something "befalling" the property, which ought not to have occurred.

follow from that fire. An intervention or interruption on the part of a fresh cause will break the chain of causation and remove the originating fire into the category of the remote instead of the proximate cause. (*Pink v. Fleming*, [1890] 25 Q.B.D. 396, 397; *Reischer v. Borwick*, [1894] 2 Q.B. 548; *Fooks v. Smith*, [1924] 2 K.B. 508.) Mere concurrency, however, of some other cause in itself independent of the peril insured against, will not take the consequent damage out of the policy, if the peril insured against or any inevitable consequences directly lead towards the damage. (*Reischer v. Borwick (supra)*; *Leyland Shipping Co. v. Norwich Union etc.*, [1918] A.C. 350; *Lind v. Mitchell*, [1928] 34 Com. Cas. 81.) An Indian case decided by the Privy Council in 1912, *Ahmedbhoi Habbibhoi v. Bombay Fire and Marine Insurance Co. Ltd.*, [1912] 40 I.A. 10, provides an interesting example of how recently could be pressed, before the highest tribunal in the Empire, a view quite at variance with the foregoing principles. In that case the insurers had taken possession, for salvage purposes, of premises which had been seriously damaged by fire. Evidence was admitted (though objected to) to show that the damage which inevitably had been caused to machinery on the premises by the water used to extinguish the flames, had been materially increased by the insurer's negligence while in possession of the premises in allowing the water to remain on and around the machinery, and by doing nothing to remove the rust or to lubricate the parts. It was contended for the insurers that the loss due to fire and water is to be determined with reference to the state of things existing at the moment the fire was extinguished. Their Lordships<sup>1</sup> regarded this suggestion as too unreasonable to necessitate a final negative from them; and they held that the loss did not determine until the premises were handed back to the assured, and that any actual damage arising during their possession was the natural and direct consequence of the fire. In an early case, *Levy v. Baillie*, [1831] 7 Bing. 349, a claim upon goods stolen by a street crowd during the fire was paid without objection taken that the loss was not consequent on damage "by fire"; and there is some authority in Canada for the view that the loss consequent upon goods which have disappeared or have been stolen in the confusion consequent upon a fire were within the words "loss or damage by fire" (*Thompson v. Montreal Insurance*, [1848] 6 U.C. Q. B. 319), but it is not easy to reconcile such a view with the accepted doctrines regarding the interposition of an independent event.

It is said that, as a general rule, it is immaterial how a fire originates. This only means that once it is accepted that the damage for which a claim is made is directly referable to such a fire, it is no longer of interest to determine its origin. But it may be that without knowing the origin of the fire, it cannot be determined whether the risk is one which is within the policy. Such difficulties of course only arise when the policy contains special "exceptions" to what would ordinarily be risk assumed under the general words.

Most modern policies include amongst such excepted perils, fires consequent upon earthquake; and therefore, where a fire has broken out at or about the time of such a disturbance, the origin of the fire resulting in damage for which claims are made may well give rise to the most important issue in the controversy.

The Jamaican earthquake cases (1907-1910) provide first-class illustrations of the respective doctrines of proximate and remote causation. The maxim, which has earlier been alluded to, *in jure proxima non*

<sup>1</sup> Lords Macnaughten and Moulton, Sir John Edge and Mr. Ameer Ali.

*remota causa spectatur*, applies.<sup>1</sup> Thus, where a building containing combustible substances breaks into flame, because the whole or some of it is so shaken down by earthquake as to give parts of the structure or their contents an opportunity of catching fire, the cause of the damage must be held to be the fire thus accidentally engendered.

Accordingly, where by the conditions of a policy loss or damage "occasioned by" or "happening through" the fall of any building or part thereof "except as a result of fire" is expressly excepted, the predisposing influence of an earthquake would prevent the assured recovering.

So where a fire originating in an earthquake spreads from one insured premises to another by nothing but natural causes, an earthquake exception in the relative policies would prevent any of the assured recovering. On the other hand, if someone—say, on a failure of the ordinary street or domestic lighting consequent upon the earthquake—were to seize a burning brand out of the débris of premises so ignited, and in his attempt to use it elsewhere for purposes of illumination were accidentally to set fire to insured premises or indeed any assured property, the damage done would be outside the natural course of events, and an earthquake exception clause would not prevent the assured recovering. The foregoing principles are deducible from the celebrated summing up of Bigham, J.,<sup>2</sup> in *Tootal Broadhurst Co. Ltd. v. London and Lancashire Fire Insurance Co.*<sup>3</sup>

Apart, however, from controversies provoked by warranties, express or implied, or by conditions in the nature of exceptions to the ordinary perils, it remains true that the origin of a fire is for the most part immaterial to the assured's right to recover. So, unless otherwise provided by the policy, faulty construction of a building, ignorance of the forces of nature which may lead to combustion, carelessness and negligence, however gross on the part of the assured's servants and agents and even on the part of himself, will not disentitle him to recover. He does not warrant that he will conduct himself otherwise, or that he has any special degree of knowledge. And, indeed, inasmuch as careless construction and careless user of property are among the most notorious causes predisposing to loss and damage by fire, these are the very circumstances from the effect of which persons interested in property seek to protect themselves by contracts of insurance.

Once, however, an assured is apprised of the existence of a fire on the insured premises, or of the imminence of such danger to the subject-matter of his policy, there will devolve upon him duties, the neglect of which may, it seems, debar him from recovering. Immediate notice to the insurers is one of those duties. Assuming him to be so situated as to be able effectively to bear a part in putting out the fire, or in any manner mitigating damage actual or predictable, and he does nothing in those regards, such negligence will sound as a breach of duty reasonably to be expected of him, and may affect his right to recover. It has indeed been held in Canada that a plaintiff who having done nothing himself towards mitigation of the damage but has actually obstructed salvage, is not only precluded from recovering for such property as is lost by his own behaviour, but forfeits all benefits under the contract. (*Devlin v. Queen Insurance Co.*, [1882] 46 Can. Q.B. 611.)

<sup>1</sup> See p. 183, *ante*.

<sup>2</sup> Afterwards Viscount Mersey.

<sup>3</sup> Reported only in Appendix IV to Welford and Otter-Barry's *Law Relating to Fire Insurance* (Butterworth), 3rd Ed., p. 498.

**Fire Brigades.**—In England and in most of the Dominions, as also in some of the principal cities in India, there are organised and recognised Fire Brigades which are at once created and protected by the law.<sup>1</sup> An English statute provides that all damage caused by the intervention of the Metropolitan Fire Brigade is to be deemed loss and damage by fire within the meaning of a policy of fire insurance. Amateur Fire Brigades are not so protected in England (*Carter v. Thomas*, [1893] 1 Q.B. 673) and if they enter upon property they do so with no more colour of right than may be enjoyed by any ordinary citizen acting under the stimulus of a benevolent purpose. It so happens, however, that by the Common Law of England the rights enjoyed by the public at large in matters of this kind are considerable. And thus conduct which, but for the *bona fide* purpose and the apparent necessity which informs it, would be held tortious, may be justified. So early as the 9th year of Edward IV, Littleton, J., laid it down that a man, in order to protect his own property from the spreading of a fire, might knock down a house intervening between his own and the burning premises. (Year Book. 9 Edw. IV, p. 35, pl. 10.) In *Maleverer v. Spinke*, [1538] Dyer 35 b, 36 b, the Judges said, "We will well agree that in some cases a man may justify the commission of a tort, and that is in some cases where it sounds for the public good; . . . also a man may justify pulling down a house on fire for the safety of the neighbouring houses; for these are cases for the common weal." A century later in *Mandy v. Scott*, [1661] 1 Lev. 4, it is said "The law of necessity dispenses with things which otherwise are not lawful to be done, as to knock down my neighbour's house for preventing the spread of fire." In *Carter v. Thomas*, alluded to above, a situation of some public interest had arisen. An urban authority had created a local Fire Brigade acting under powers conferred by section 171 of the Public Health Act, 1875. This brigade, in the ordinary course of its duties, had arrived on the scene of a fire, and the officer in charge had directed the respondent, Thomas, not to allow any other persons to come on the premises while the brigade was at work. The appellant, Carter, was an official of a Volunteer Fire Brigade who appeared upon the scene in uniform and was denied admission by Thomas. In attempting to force his way in he was said to have committed an assault upon Thomas, for which he was subsequently convicted and fined. The case came before the Queen's Bench on a case stated by the local justices, it being contended for Carter that he was justified in what he did. In delivering a concurring judgment Kennedy, J., observed as follows:—

"I can conceive circumstances under which such an act might be justifiable; as, for instance, if it were necessary in order to save life, or perhaps also if there were an insufficient force on the premises for the purpose of extinguishing the fire, or if the duty of the persons employed in doing so were being neglected, and danger to the property were the result. Here there is no such suggestion, and therefore there is no justification for what the appellant did. He can show no title except his good intention. If it were necessary, I should be prepared to hold that the respondent was discharging a duty involving the exclusion of unauthorized persons from the premises; but it is unnecessary to rest my decision on this; because, for the reasons I have given, I am of opinion that the magistrates have come to a right conclusion."

<sup>1</sup> *E.g.*, Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict., c. 90), and Bengal Act I of 1893 and secs. 397-400 of Bengal Act XV of 1932.

The principles embodied in the foregoing observations were accepted in *Cope v. Sharpe*, [1910] 1 K.B. 168. (See particularly Pickford, J., at page 172.) It is conceived that the Courts in India would allow similar rights to the public in this regard: always assuming that what was done could be shown as having been done in good faith and as necessitated by the circumstances. It is thought, moreover, that the Courts would hold, apart from statute, that loss or damage caused by acts in the nature of salvage or directed towards extinguishing or stemming a conflagration would be loss and damage "by fire" within the meaning of a policy of fire insurance, in cases where the said acts were those of a Fire Brigade or even of ordinary members of the public, strangers to the contract.

An example of suitable Indian legislation for the creation and protection of Fire Brigades and their Officers, and for making their labours of assistance to insurers, is furnished by the provisions of Chapter V of the Bengal Licensed Warehouse and Fire Brigade Act (Bengal Act I of 1893), sections 32 to 35 of which may be usefully quoted. They are in the following terms:—

"32. (1) On the occasion of a fire, the Commissioner or Deputy Commissioner of Police, or the Chief or other Officer in charge of the fire-brigade on the spot, may—

(a) remove, or may order any member of the brigade to remove, any persons who by their presence interfere with the due operations of the brigade;

(b) by himself or by his men break into or through, or pull down, any premises for the purpose of putting an end to the fire, doing as little damage as possible;

(c) cause the mains and pipes of any district to be shut off, so as to give greater pressure of water in the place where the fire has occurred;

(d) call on the Officer in charge of the Port Commissioners' fire-engine to render such assistance as may be possible, in the case of any fire occurring near the river bank; and

(e) generally take such measures as may appear necessary for the preservation of life and property.

(2) The Commissioner or Deputy Commissioner of Police, or the Chief Officer on the spot in charge of the brigade, may verbally nominate and depute one or more Officers of the brigade to act at a distance; and such Officer or Officers shall have for the time being the like powers as the Chief Officer himself possesses under this section.

33. Police-officers of all grades shall be authorized to aid the fire-brigade in the execution of its duties. They may close any street in or near which a fire is burning, and they may, of their own motion or on the request of the Chief or other Officer of the fire-brigade, remove any persons who interfere by their presence with the operations of the fire-brigade.

34. No Officer of the police or of the fire-brigade shall be held liable to damages on account of any act done by him in the *bona fide* belief that such act was required in the proper execution of his duties.

35. (1) In the case of any fire occurring within the area to which this Act applies, the Chief Officer of the fire-brigade shall ascertain the facts as to the origin and cause of such fire, and shall make a report thereon to the Magistrate having jurisdiction in the place in which such fire shall have occurred; and the said Magistrate, in any case where he

may see fit, shall summon witnesses and take evidence in order to the further ascertainment of such facts.

(2) Copies of all reports and of all evidence recorded under this section shall be furnished on application to any Fire Assurance Company or other person interested, on payment of the fees payable for the copies of judicial proceedings."

Provisions in many ways similar have been the subject of enactment in the Bombay and Madras Presidencies and in the Punjab. (*Vide* Madras Act III of 1888, section 61; Bombay Act III of 1888, sections 359-364; and the Punjab Municipal Act, 1911, sections 93-95.) In some respects the powers taken under the Bombay statute cited are more extensive than are those conveyed under either of the Bengal Acts alluded to. For example, under clause (b) of section 361 of the Bombay Act power is taken not only to break into or through or pull down any premises for the purposes envisaged, but to "take possession" of them. Again, under clause (c), power is taken to utilize the water of any well or tank available. But the provision which is of the greatest importance, alike to insurers and assured, is to be found in section 363 which is thus worded:—

"363. Any damage occasioned by the Fire Brigade in the due execution of their duties or by any Police or Municipal officer or servant who aids the Fire Brigade shall be deemed to be damaged by fire within the meaning of any policy of insurance against fire."<sup>1</sup>

The Bombay Act contains nothing as useful as the provisions of section 35 (2) of the Bengal Act cited. Reports of every fire occurring in the city of Bombay are, however, to be submitted to the Municipal authorities not later than the day after the occurrence.

**The subject-matter of insurance.**—The subject-matter of a contract of fire insurance is "property" in the widest sense of that word. Thus, it may be a ship, buildings, articles of apparel, goods in a mercantile sense, works of art or any document, as well as those less tangible forms of property such as rents and profits. It is obvious that the exigencies of such a contract require a sufficient description of the property at risk to prevent the contract being void for uncertainty or by reason of a mistake common to the parties. A discussion of the law relating to the sufficiency of description in contracts of fire insurance finds a place later in the present chapter.

#### 4. *How cover is effected.*

In what follows the word "cover" is used to include the effect of the protection afforded by a contract of insurance. Thus, it includes "cover" by means of the finished instrument, *i.e.*, the policy, as well as any temporary protection otherwise secured. In the law of India there is nothing to prevent a contract of insurance being made verbally, save in so far as the provisions of the Indian Stamp Act intervene.<sup>2</sup> In practice, fire insurance is largely effected through agents of the insurers. Such agents bear no small part in the preliminary negotiations. Naturally, their contribution to the formation of the contract, to be effective, will

<sup>1</sup> Similar provisions have been made in the corresponding legislation in Madras and in the Punjab.

<sup>2</sup> As to which, see p. 225, *post*.

depend upon the nature and extent of the authority expressly or impliedly bestowed upon them. In practice, too, proposals and acceptances are put into writing; so, too, are the terms under which some temporary protection may be enjoyed while the insurers are considering the proposal. The document securing such temporary protection is variously styled the "slip", or "covering note", the "protection note", the "cover-note", and sometimes the "interim receipt": the reason, in the latter case, being that the common form of the note contains a recital evidencing receipt of some payment by way of premium.

In contemplation of law, however, the temporary insurance thus effected forms a valid contract wholly distinct from that created by the ultimate issue of a policy (*Thompson v. Adams*, [1889] 23 Q.B.D. 361), and not the less so that the policy ultimately issued has been antedated to the date of the cover-note, when, in contemplation of law, the temporary contract is merely merged in the permanent one. Thus, where a policy is not so antedated, the permanent contract runs from the date of the policy. During the currency of the temporary cover, an assured may rescind from his proposal. (*Mackie v. European Assurance Co.*, [1869] 21 L.T. 102.) Similarly, the insurers may ultimately reject the proposal. Consequently, the issue of a cover-note does not bind them to issue a policy. (*Re Yager and Guardian Assurance Co.*, [1912] 108 L.T. 38.) Both contracts, i.e., the temporary and the permanent one, must, by an express provision, indicate the time during which the protection will run. Otherwise, they would, as contracts, be void for uncertainty. As against the assured, the terms and conditions finally appearing in a policy are not to be read into the temporary insurance provided by the cover-note, unless the latter expressly attracts them. (*Re Coleman's Depositories Ltd. and Life and Health Assurance Association*, [1907] 2 K.B. 798 C.A.) As against the insurers, the note is to be read with reference to their ordinary form of policy; and they may not set up terms inconsistent with such a policy. (*Browning v. Provincial Insurance Co. of Canada*, [1873] 5 P.C. 263, 273.) Though the payment of premium is the consideration for the insurance given—be that for the period ultimately named in the policy or for the shorter period for which a separate contract, evidenced and expressed by a cover-note, provides—the pre-payment of premium is not necessarily a condition precedent to the attaching of the risk. In other words, an insurer may waive pre-payment, if he chooses; in which case, on a loss occurring, he is as much bound by the terms of his contract to indemnify the assured to the extent of his cover as he would have been had the premium been already paid. (*Thompson v. Adams (supra)* at p. 364. See also *Hari Kishan Das v. Guardian Assurance Co.*, [1934] 56 All. 237.) "In our opinion," said their Lordships on appeal in the last-named case (at p. 240), "on the receipt by the defendant of the intimation by the plaintiff company that the risk was covered, there was a valid contract between the parties; and it could be enforced notwithstanding the fact that no policy in the usual form had been issued and no premium had been paid."

Usually, an insurer's agent has himself authority to issue cover-notes; and if he be supplied with a book of forms for the purpose, this is evidence of sufficient authority to bind the insurer generally. (*Mackie v. European Assurance Co.*, [1869] 21 L.T. 102.) The student must mark, however, that many fire insurances are effected with Lloyd's underwriters, with whom there is a custom that the "slip" takes the place of the cover-note commonly issued by other classes of insurers, and that the "slip", once initialled, affords no mere temporary protection, but, by the custom of

Lloyd's, operates so as to produce as binding a contract between the parties as would be effected by a policy in the usual form.

**Effect of the Indian Stamp Act.**—In India, a policy of fire insurance must be stamped. The question arises, however, as to whether, if at all, a document purporting to provide temporary protection against fire, e.g., a Lloyd's slip, or a cover-note in the usual form, is effective in India for the purpose intended, unless it be stamped. It is submitted that it is not. The provisions of the Indian Stamp Act (II of 1899) which thus intervene between the assured and the benefits he would otherwise derive under the Law Merchant, are to be found in what is styled the General Exemption, which is appended to Article 47 of the Statute. That whole exemption reads as follows:—

*“General Exemption.*

Letter of cover or engagement to issue a policy of insurance:

Provided that, unless such letter or engagement bears the stamps prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned.”

It will be at once apparent that what is alluded to above as negating the custom of the trade are the words of the proviso to the foregoing exemption. Inasmuch as, in the case of fire insurance, the cover-note, according to the authorities cited above, does not entitle an assured to demand a policy<sup>1</sup>, its only use to the assured is to provide him with a contract upon which he can claim. It is evident that this is a use of a cover-note which is prohibited to him in India unless it be stamped as a policy. The student, however, who has perused Chapter IV<sup>2</sup> of the present treatise will have learned that the law by which a contract is governed is, generally speaking, the law of the place where the contract is made (*lex loci contractus*). Thus, if a fire insurance be effected in England, it would seem that a cover-note, though sued upon in India, need not be stamped. But if the actual money were payable in India, the law to be applied would appear to be the law of this country, as being that of the land wherein the contract was to be performed (*lex loci solutionis*), in which case, the cover-note, if it form part of the cause of action, would have to be stamped as a policy. The same principles would appear to apply whether the insurance be effected on moveable or immoveable property. “The locality of the subject-matter of insurance does not appear to have any bearing upon the question of what law is to be regarded as the proper law of the contract. The rule that where the contract affects immoveables situate out of the jurisdiction, the *lex loci rei sitae* in general, at least, must be taken as the proper law of the contract, has no application.”<sup>3</sup>

It is, however, open to a “holder” of a policy of insurance<sup>4</sup>, “issued by an insurer in respect of insurance business transacted in British India”

<sup>1</sup> See p. 223, *ante*. It is otherwise in Marine Insurance, as to which see Chapter IV, pp. 116-129 and 213, *ante*.

<sup>2</sup> See pp. 137, 138.

<sup>3</sup> Welford and Otter-Barry, *op. cit.*, 3rd Ed., p. 409, where under note (m) the learned authors state that “in none of the reported cases relating to policies upon foreign immoveables has the suggestion ever been made that the *lex loci rei sitae* has any application”.

<sup>4</sup> By sec. 46 of the Act (IV of 1938).

after the date when the Insurance Act, 1938, shall have come into operation "*notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto*," (a) to receive payment in British India of the sum secured, and (b) to sue for relief in British India. If the "holder" elects to sue in British India, then "*any question of law arising in connection with any such policy shall be determined according to the law in force in British India*." It may be surmised, we think, that this section will give some amount of trouble; more perhaps with regard to its possible effects upon contracts of marine, than upon those of non-marine, insurance.

### 5. *Duration of the Risk.*

It has already been pointed out that every contract of insurance is limited by time. It is this factor which fixes the duration of the risk. The modern practice is to state not only the date (and often the hour) from which the risk begins to run, but the date and hour when the risk ceases. At the last-named hour the contract, in the language of lawyers, "determines by efflux of time". The contract may, of course, determine otherwise: as by frustration of its object, satisfaction of the obligation to indemnify, insistence upon a breach of a warranty or upon an infraction of the rules as to disclosure and, more commonly, upon a breach on the part of the assured of his obligation to pay the premium when the same shall have fallen due. In the last-named event the policy is said to lapse. Lapsed policies may, in the language of commerce, be "revived"; while policies which have run their course, may, in the same language, be "renewed". In contemplation of law the revival of a lapsed policy or the renewal of one that has run out is entirely a new contract; and not the less so, that the terms of the new contract thus created may be identical with those governing the earlier contract, may cover the same type of risk, and have the same property for its subject-matter. Naturally, then, any concealment on the part of the assured of any material fact touching some circumstance arising or coming to his knowledge since the execution of the first contract would vitiate the revived or renewed policy, unless the insurer should consent to waive the breach.

**Revived or Renewed Policies.**—It follows that a so-called revived or renewed policy involves a fresh proposal unequivocally accepted upon the basis of an agreed premium, if such an arrangement is to bind the parties. When, therefore, an insurer reminds an assured that a policy will shortly expire, and enquires if the assured desires to renew it, or if the insurers state their willingness to renew it for a specified premium, such conduct on their part, at the highest, amounts to no more than the making of a fresh proposal; and it needs an unequivocal acceptance on the part of the assured to conclude the new contract. In like manner when an assured, desirous of effecting a renewal, tenders money by way of premium, he is making a proposal which must be as unequivocally accepted by the insurers, before it can be said that the latter are anywise bound. Even the fact that a premium so tendered has reached the hands of insurers does not, *per se*, bind them to issue a renewed policy or to revive a lapsed one. So, too, neither a demand by their agent for a particular sum by way of renewal premium, nor the latter's acceptance of what the assured may tender in that regard, will bind his principals, unless he has definite authority to settle the terms on which the policy may be "renewed" or "revived", as the case may be.

Three modern decisions of the Courts in India well illustrate the foregoing principles.

In *Kwa Hai v. Northern Assurance Co. Ltd.*, [1924] 2 Ran. 158, the material facts were that an agent employed merely to introduce business to the insurers had purported to accept a premium from a proposer desirous of insuring his premises, including a retail shop, against fire. The premium was ultimately held to have been insufficient under the insurer's scales; and it was found, as of fact, that the agent had no authority to accept that or any other proposal. The premises having been, shortly after, burnt down without any acceptance by the insurers of the proposal thus made, the plaintiff was held disentitled to recover. In 1932 the Court of Appeal in Calcutta (Rankin, C.J., and C. C. Ghose, J.), in *Ram Singh v. Century Insurance Co. Ltd.*, [1932] 60 Cal. 332, held the renewal of a fire policy not to operate as a continuing contract relating back to the original policy, but to be a fresh contract and, even if antedated to the date of expiry of the former policy, would not cover the risk of fire occurring before the acceptance of the renewal. In *Universal Fire and General Insurance Co. Ltd. v. Shup Sin Htai*, [1934] 4 Comp. Cas. 428, the material facts were that a certain fire policy in favour of the plaintiff had expired in June 1931. A month later a canvassing agent of the insurers took from the plaintiff a certain sum for the purpose of effecting a new insurance. This agent gave the plaintiff a receipt for the amount paid and told him that a formal receipt, as also a policy, would be issued in due course. The agent did not forward the premium to the insurers, nor did he communicate any proposal from the plaintiff to them. Naturally, therefore, neither a policy nor a covering-note had been issued to the plaintiff when, six weeks later, the plaintiff's property was destroyed by fire. The Court of Appeal of Rangoon (Page, C.J., and Das, J.), held that as the canvassing agent had no authority to accept proposals or to renew policies, there was, at the material date, no contract of insurance between the parties, and the company was not liable.

## 6. Insurable Interest.

**Preliminary.**—An insurable interest in property at risk under a fire policy may arise from the natural relationship between the assured and that property or by operation of law. The distinction is perhaps not so important in India as it is in England, where in certain cases there is a statutory obligation to insure. In India, however, certain persons may be required, by virtue of a statute, to insure if so directed.<sup>1</sup> Apart from statute, an obligation to insure against fire may be created by will or may arise *ex contractu*. It is not only the legal, but the beneficial owner of property who possesses an insurable interest therein;<sup>2</sup> and it

<sup>1</sup> *E.g.*, by sec. 17 of the Trustees' and Mortgagees' Powers Act (XXVIII of 1866), whereby a Receiver is required (if so directed in writing by the person entitled to money secured by a charge upon property) "to insure and keep insured from loss or damage by fire... the whole or any part of the property... which is in its nature insurable."

<sup>2</sup> Probably mere possession is sufficient to give an insurable interest: *Stirling v. Vaughan*, [1809] 11 East 619, 629; even wrongful possession: *Marks v. Hamilton*, [1852] 7 Ex. 323; and see *Williams v. Baltic Insurance Association of London*, [1924] 2 K.B. 282, 290 as to temporary possession of a chattel (motor car insurance). It is doubtful whether mere use and enjoyment under a revocable licence confers an insurable interest unless coupled with physical possession or dominion pursuant to such licence (see *Macgillivray, op. cit.*, 2nd Ed., p. 234, and cases cited).

has been held in England that a bankrupt,<sup>1</sup> as the ostensible owner of property, may himself insure it, although upon adjudication the property has vested in the statutory authority under the Bankruptcy Acts. All Receivers, as well official as otherwise, Official Assignees under the Presidency Towns Insolvency Act, Executors and Trustees, as also bailees whether gratuitous or for reward, are entitled to insure any property, itself insurable, which may be in their charge. Though they be not necessarily compellable to insure, persons in such fiduciary positions may often find themselves answerable in damages for not so doing; the doctrine being that all persons so placed with regard to property must protect it with as much care as they would devote to their own. It is thus a question of fact in each case, whether a failure to insure or to keep up a policy of fire insurance would, in the prevailing circumstances, and on the destruction of or injury to the property by fire, sound as negligence for which damages might be recovered.

In ascertaining whether a particular person has or has not a sufficient interest to claim benefits under a policy of fire insurance nice questions often arise.

**Sale of goods.**—In *Brij Coomaree v. Salamander Fire Insurance Co.*, [1905] 32 Cal. 816, and the cross appeal (a case before the Indian Sale of Goods Act<sup>2</sup>), it was decided under the Contract Act that where the sale is of unascertained goods and there has been no subsequent ascertainment or appropriation, there could be no effective sale so as to pass the property to the buyer, who, accordingly, could have no insurable interest therein. In the other appeal, disposed of at the same time, it was decided that where the parties to a sale of ascertained goods have agreed that payment and delivery are to be postponed, the property in the goods passes by operation of law to the buyer so soon as the proposal for sale is accepted, whereafter, the buyer has an insurable interest in the goods. In that case the well-known decision in *Inglis v. Stock*, [1885] 10 A.C. 263 was cited. There a vendor shipped certain goods f.o.b. for satisfying two contracts with two different purchasers. The purchasers had made no allotment of these goods as between themselves. The Court treated the position of these two purchasers in the matter of their interest in the total consignment as that of tenants-in-common. Lord Selbourne pointed out (at p. 267) that “the appropriation necessary as between vendor and purchaser and the division as between purchaser and purchaser, of specific goods, actually appropriated to the aggregate of two contracts, are two very different things.” Each purchaser in the case was held to have an insurable interest in the goods.

The passing of property in goods in India by sale is now governed by the provisions of Chapter III of the Indian Sale of Goods Act, which comprises sections 18 to 30; but the incidence of foreign law relating to such contracts cannot be disregarded by students of the law relating to insurance, inasmuch as the question of a claimant having an insurable interest in goods the subject-matter of a policy may well have to be determined by the foreign law governing the particular contract of sale. In an American Case, *Anderson v. Crisp*, 5 Wash. 178, the contract was for the sale of “merchantable bricks”, which, however, the buyer was compelled by the terms of the contract to sort out for himself at the brick-kiln. The Court held that the property could not pass until this

<sup>1</sup> *Marke v. Hamilton* (*supra*) at p. 324.

<sup>2</sup> Act III of 1930.

operation had been concluded: it being impossible earlier to determine either what bricks or what portion of the kiln were sold. The doctrine of ownership in common is recognised, and the sale of an undivided share thereof is provided for by section 6 (2) of the American Sales Act which is in the following terms:—"In the case of goods of uniform quality and character (i.e., goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit), there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight or measure of the mass."

By the law of England, where the property of several owners has been reduced by a fire into an indistinguishable mass, they are tenants-in-common of that mass. (*Buckley v. Gross*, [1863] 3 B. & S. 566.) In *Spence v. Union Marine Insurance Co.*, [1868] 3 C.P. 427, cotton, the property of several owners, had been shipped in bales, sufficiently marked by the respective owners. Consequent upon the wreck of the ship, much of the consignment was lost. Salvage operations, however, had saved a portion of the goods; but in the property thus saved the marks had become obliterated, and the goods so mixed up that individual ownership on the basis of the original marks could not be established. The owners were held tenants-in-common of the goods saved.<sup>1</sup> In *Abdul Aziz Bepari v. Jogendra Krishna Roy*, [1916] 44 Cal. 98, the defendants had effected two insurances against fire on jute stored in certain godowns. Neither the application for insurance nor the policies were produced, but the Court considered that sufficient evidence existed to show that the defendants in effecting these insurances had described the jute as their property. The question between the parties to the suit was whether at the time of the fire which destroyed the property at risk, that property had, in fact, passed to the defendants or was still vested in the plaintiffs as the sellers. The defendants as buyers had made certain advances, and the Court treated the transaction in suit as governed by a local custom of trade at Chandpur, whereby the buyer is entitled to the custody of the jute as security for his advances, and that while, by the custom, the weighment is carried out by the buyers (the defendants), the latter would be obliged to buy as much of the jute they had contracted to buy as came up to the requisite standard, and that unless and until any of the jute tendered under the contract were rejected by the buyers, the sellers could not sell to others. The point for determination was whether the defendants, who had not yet weighed all the goods upon which they had advanced money, had such a property in them as entitled them to the benefits of the insurance, or whether the property still vested in the unpaid sellers. The insurance did not cover the entire quantity of the jute destroyed by the fire. It was held on appeal that the defendants had an insurable interest in the goods, and had effected such insurance for the protection of their own interest, and not for that of the sellers for whom they were not bound to insure. The defendants, therefore,

<sup>1</sup> The principle applied here is borrowed from the Roman Law. The *jus civile* uses the word *commixio* of objects dry or solid which have become intermingled with one another. It uses the word *confusio* of things liquid which have become merged. If property thus intermingled could be separated, *commixio* or *confusio* did not affect ownership. Where, however, separation could not be effected, owners were regarded as joint-owners of the whole.

were entitled to apply the whole of the amount they received under the policies to indemnify themselves, and were not bound to apply any portion of it for the benefit of the plaintiffs.

**Interest in immoveable property.**—In *Gnana Sundaram and Ors. v. The Vulcan Insurance Co. Ltd.*, [1931] 9 Rang. 452; [1931] 1 Comp. Cas. 365, the material facts were that the plaintiffs had insured a certain house with the defendant company against fire. During the year following they sold the house to another defendant in the suit, and on the same day by a further contract in writing agreed to repurchase the same property before a certain date (about 10 months later). In the meantime, and before such re-purchase had been effected, the property was destroyed by fire. There were concurrent findings of fact by the original and the appellate courts that there had been an out-and-out sale to the defendant purchaser, and a mere contract to buy back the property by the plaintiff, and that there was nothing the plaintiff had in the nature of an interest in or charge upon the property within the meaning of section 54 of the Transfer of Property Act. But the Court of Appeal (Page, C.J., and Mya Bu, J.), applying principles stated in *Lucena v. Craufurd*, [1806] 2 B. & P.N.S. 269 (see p. 67, *ante*) and *Castellain v. Preston*, [1883] 11 Q.B.D. 380, dissented from the view that an “insurable” interest was synonymous with a “legal” interest in the law relating to real property.<sup>1</sup> “The plaintiffs were possessed of something more than a mere option to purchase the premises. The agreement was a concluded contract. . . . and at the time of the fire, plaintiffs were in a position to obtain specific performance of the agreement.” “In those circumstances” the Chief Justice was of opinion that “the plaintiffs possessed an insurable interest at the date when the fire took place.”

**Defeasible Interests.**—In America, the doctrine—as old as *Lucena v. Craufurd* (*supra*)—that an interest is nonetheless insurable because it is defeasible on the happening of a future event, has been extended, and it is there held that the property under a contract or title which is not void, but voidable, gives an insurable interest in the property until the contract or title is set aside; and the Canadian courts have doubted “whether in a case where the assured’s title has never been challenged or disputed. . . . the insurer can set up the title of a stranger as a defence to an action on their contract”.<sup>2</sup> In more modern times in England, it has been held that a right (not a bare expectation of acquiring one) affords an insurable interest in property, even if the chance of the assured coming into possession be extremely remote. (*Moran, Galloway & Co. v. Uzielli*, [1905] 2 K.B. 555; *Chaplin v. Hicks*, [1911] 27 T.L.R. 458.)

**Consignees.**—A “bare” consignee may be described as one to whom goods have been forwarded, but who has not yet obtained possession and who has neither the legal title nor any lien on the goods for advances made. It was decided so far back as *Seagrave v. Union Marine etc.*, [1866] 1 C.P. 305, that a person so positioned has no insurable interest.<sup>3</sup>

<sup>1</sup> The Indian student will remember that the word “real” is here used in the technical sense developed in the law of England relating to what may be roughly classed as property in land and in things physically attached to the land.

<sup>2</sup> Macgillivray, *op. cit.*, 2nd Ed., p. 201, note (1), and the cases cited.

<sup>3</sup> The student must mark that though such a person has no insurable interest in the goods themselves, he may have an insurable interest in some commission or profit which he may expect to make as agent. Such an interest cannot be based upon a mere expectation of such employment. *Buchanan v. Faber*, [1894] 4 Com. Cas. 223.

It is otherwise if he be a consignee to whom the document of title<sup>1</sup> has been endorsed. (*Sutherland v. Pratt*, [1843] 11 M. & W. 296; *Ebsworth v. Alliance Marine*, [1873] 8 C.P. 598.) So, too, if he has a lien on the goods as security for repayment of advances, his insurable interest is co-extensive with the amount he has advanced, and not the less so that he may not have obtained either possession of the goods or any legal title to them. (*Wolff v. Horncastle*, [1798] 1 B. & P. 316; *Robertson v. Hamilton*, [1811] 14 East 522; *Parker v. Beasley*, [1814] 2 M. & S. 423; *Carruthers v. Sheddon*, [1815] 6 Taunt. 14.) It has been held in America that a commission agent may insure goods in his own name and may recover not merely any advances which he may have made together with interest and all other charges by way of commission and whatever else may be allowable by mercantile usage, but can recover for the full damage sustained. (*De Forest v. Fulton Fire Co.*, [1828] 1 Hall (N.Y.) 94.) The topic of insurable interest in profits and gains and the like is expressly dealt with later in this chapter.<sup>2</sup>

**Wharfingers, warehousemen, etc.**—By the Common Law of England, a wharfinger is not responsible for goods casually burnt on his premises. He may, however, be liable under a local custom. This was the case in *North British and Mercantile Insurance Co. v. London Liverpool and Globe etc.*, [1877] 5 Ch. D. 569. In India, and apart from custom, he is in the position of a bailee.<sup>3</sup> It was decided in *North British and Mercantile Insurance Co., v. Moffatt*, [1871] 41 L.J. C.P. 1, that where a wharfinger has given delivery warrants in respect of goods sold while in his keeping, such goods cease to be at his risk, and his insurable interest therein determines from the date of the relative delivery warrant. This doctrine is accepted in America. (*Lockhart v. Cooper*, [1862] 42 Am. Rep. 514.) Wharfingers and other warehousemen may, in their own names, insure goods on their premises, and in case of loss may indemnify themselves first; but though they may recover the full amount under the policy, they must hold the balance for the owner or owners of the goods. (*Waters v. Monarch Fire and Life Assurance Co.*, [1856] 25 L.J. Q.B. 102; *London and North Western Railway v. Glyn*, [1859] 28 L.J. Q.B. 188.) Agents as well as warehousemen may sometimes secure margins, uninsured by other policies, by means of floating, or (as they are sometimes known) by "blanket" policies. The practice is well known in America.

**Interest by virtue of entrustment.**—As already stated, one who is a trustee within the meaning of the law of trusts has, in India, an insurable interest in the subject-matter of the trust, and this is true no matter how the trust may have been created. But entrustment as used in the law relating to insurance, and as expressed in such a phrase as "goods in trust or on commission"—one commonly employed in fire and other policies ever since the beginning of last century—has not the limited meaning which it might, at first sight, seem to possess. In an early Scottish case (*Donaldson v. Manchester Insurance Co.*, [1836] 14 Shaw (Ct. of Sess.) 1st series, 601), the Court had to construe the words "goods in trust" in a policy against fire taken out by a wharfinger and warehouseman upon goods deposited with him, on which he had a lien for rent and other charges. On the burning down of his warehouse with all it contained, the insurers refused to pay him anything more than the

<sup>1</sup> E.g., a railway receipt.

<sup>2</sup> As to which see p. 189, *ante*.

<sup>3</sup> See p. 236, *post*.

value of his own property and what he was entitled to in respect of claims secured by his lien. "What" said Lord Campbell "is meant in these policies by goods 'in trust'? I think it means goods with which the assured was entrusted, not goods held in trust in the strict technical sense." *North British and Mercantile Insurance Co. v. Moffatt* (p. 231, ante) was an example of a policy wherein the insurers had sought and succeeded in making their responsibility co-extensive with that of the assured by accepting liability only on "goods in trust or on commission, for which they (the assured) are responsible". Upon the facts it turned out that the assured was not responsible for the goods destroyed, and consequently could derive no benefit from the policy. See also *Engel v. Lancashire and General Assurance Co.*, [1925] 41 T.L.R. 408.

*Cochran and Son v. Leckie's Trustee*, [1906] 8 Ct. Sess. (5th series) 975, was a case in which a miller, by name Leckie, had effected a fire insurance in his own name covering "stock-in-trade, the property of the insured or held by him in trust or on commission for which he is responsible". Cochran and Son, the plaintiffs in the action, had delivered hay to Leckie to be chopped, and had received from him a communication stating "all goods held in trust covered by insurance against fire". The Court of Session in Scotland held Leckie to have contracted to insure Cochran and Son's hay on the latter's behalf, and that, even assuming the policy not to cover customer's risks, the insurers having paid the value of the plaintiffs' hay to Leckie's trustee, the former were entitled to rank preferentially in respect of any money recovered under the policy.

The cases upon the topic of entrustment for the purpose of construing the phrase "in trust or on commission"—one common in commercial insurance—and which were decided prior to 1927, must now be read subject to the decision of the House of Lords in *Lake v. Simmons*, [1927] A.C. 487. The last-named case raised questions of great importance to commercial insurers generally, questions which, we feel, need some special discussion having regard to the peculiarities of the law in India. Such a discussion will be found later in the present chapter, where certain exceptions commonly found in modern fire policies are considered.

**Shebaitis, Mohunts and Mutwallis.**—The position of *Shebaitis* and *Mohunts* in relation to Hindu *debutter* property of which they have charge, and of *Mutwallis* in the matter of estates which have been dedicated as *wakf* under the Mohamedan law, has often raised difficulties, when an attempt has been made to describe their respective positions in terms of the law of England concerning trusts: the truth being that the structure of English social life does not present anything precisely similar to that prevailing in India, while the part played by religion in the social systems thus contrasted has always been, and still is, different, since it is based upon widely different fundamental conceptions. In the English Law of trusts, property made the subject of a trust vests in the trustee or trustees, in the sense that the trustees are conceived as having the legal estate, the beneficial estate being regarded as devolving upon those who are to enjoy the fruits thereof. These doctrines apply as much to trusts in their nature charitable or religious, as to those which may be designated private. In India the personal law of the Hindus as well as that of the Mohamedans contains corresponding machinery designed to preserve property dedicated to pious purposes; but that design has been evolved from another order of ideas. In Hindu law, property dedicated to a religious purpose is conceived as having been set apart for the use of the Godhead. To achieve that purpose, the relative law regards the property

so dedicated as actually owned by the idol named in the instrument as the dedicatee. It follows that in any litigation respecting the property, the idol (to which a name must be given) is a necessary party to the proceedings. It follows further that the *Shebait* or *Mohunt* of the shrine, who has the duty of maintaining the same, and usually the ancillary duty of maintaining the proper ritual observances in the matter of private and public worship thereat, is also regarded as the manager and custodian of the property (*debutter*), the income of which is to be spent on the requirements of such maintenance and ritual observances. It is usual for the *Shebait* or *Mohunt* to have his own maintenance out of the same property, when, to that extent, he is to be regarded a beneficiary. But in all other respects he is a manager who is also a trustee. It has been said that in respect of the idol he occupies a position not unlike that of the guardian of an infant. For the aforesaid reasons he is obliged, in all his dealings with the property committed to his care, to exercise the utmost good faith. Since one of his primary duties is to maintain the property so far as possible intact, and so to hand it on to his successors in the trust thus created, his dealings with the property may be controlled by a court of law, which will judge of the propriety of his conduct by the rules of Hindu law applicable to such matters. As he may be amenable to actions at law founded upon the notion of a breach of trust, as also for negligence, the *Shebait* or *Mohunt* has an insurable interest in that of which he is the custodian; and, though not for all purposes a trustee in the English technical sense, what he holds as manager, or as guardian of the idol, is property so "entrusted" to him as to be within the general law of entrustment as the same is understood in British India.

Dedications of property for pious purposes under the Mohamedan law are now-a-days largely controlled by the Wakf Act (VI of 1913), read with the Mussalman Wakf Validating Act (XXXII of 1930): the effect of the latter enactment being to make the provisions of the earlier statute retrospective. Prior to the above-named legislation, doubts had arisen as to whether the dedication of property for the maintenance and support, wholly or partially, of a family, was anything more than a family trust: in other words, whether the mere mention of some residual pious purpose brought it within the conception of such a pious dedication of property as entitled the grant to be classed as *wakf* within the Islamic law. Those doubts have now been removed by the following provisions of the Mussalman Wakf Validating Act (VI of 1913):—

"3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect."

In basic conception, the *wakf* is like the Hindu dedication to an idol in this, that the gift is thought of as one to God Himself. In this respect, again like the Hindu dedication, and unlike the English religious or charitable trust, the legal estate is not thought of as vesting in the trustees. The latter in the law of *wakf* is styled the *Mutwalli*.

The duties and liabilities of a *Mutwalli* are not the creatures of the recent statutes to which attention is drawn above, but have been long settled by Islamic law; and the Courts in India give effect to every principle of Islamic law not inconsistent with any special enactment passed for the benefit of the Mussalman population of India. Indeed, all such legislation proceeds upon the basis that it is intended to implement, rather than depart from, the basic principles of such law. One of those principles, of which insurers should take note, is that property falling within the category of *wakf* cannot be alienated or mortgaged or in any way charged, unless there is power in the relative instrument creating the grant so to deal with the property; or unless, for a necessity connected with the preservation of the property, leave of the *kazi* shall have been obtained. It has been held in British India that a High Court in its Original Jurisdiction, and a District Judge in his, is to be deemed the *kazi* for the purpose of the requisite superintendence mentioned. In some provinces there has recently appeared local legislation creating a functionary styled a "Commissioner of *wakf*", upon whom notice of litigation affecting *wakf* property in the province should ordinarily be served, so as to enable him to be made a party (if so advised, or where the statute insists) for the purpose of intervening in any matter of principle.

Though the *Mutwalli*, like the *Shebait* or *Mohunt*, is not a trustee in the full technical sense of that word as understood in the corresponding law of England, but is rather a manager-trustee who under certain forms of instrument may be also a beneficiary, the property with whose care and maintenance he is charged is, nonetheless, "entrusted" to him within the general law of entrustment as the same is understood in British India. (See *Vidya Varuhi Thirtha v. Balusami Ayyar*, [1921] 48 I.A. 302; and *Sailendra Nath Palit v. Syed Hade Kaza*, [1931] 36 C.W.N. 193.) For the reasons stated above in the case of *Shebait*s and *Mohunt*s, a *Mutwalli* has an insurable interest, whether as a trustee or as a beneficiary or both, in the property which is the subject-matter of the dedication.

Both the Hindu and the Mussalman trustees of the nature under discussion, do not, by entering into contracts, even where the same be for the benefit, as subserving the objects, of the dedication, *ipso facto* bind the *debutter* or the *wakf* property in the matter of payment, whether the same be for the price of goods sold and delivered, work or labour done, or for the discharge of such a liability as the payment of premium. A power limited to the strict necessities of the case is conferred by Hindu law on *Shebait*s; but in the law of *wakf*, the trust property cannot be charged even for the purposes aforesaid except with leave of the Court, which, however, may in a proper case act with a retrospective effect. (See *Nimai Chand v. Golam Hossein*, [1909] 37 Cal. 179; approved in *Sailendra Nath Palit's case* (*supra*) at p. 211.) Consequently, he who contracts with a *Shebait*, *Mohunt* or *Mutwalli* must look to the trustee personally for the fulfilment of the obligation. Thus it is the personal

credit of the trustee which the latter pledges when he enters into a contract. (*Sailendra Nath Palit's* case (p. 234, *ante*) at p. 209; and *Mahanth Singh v. U Aye*, [1936] 14 Rang. 336.)

The expressions "*as Shebait*", "*as Mutwalli*", or "*as such trustee*" have often been resorted to by such contracting parties, in the hope of placing themselves in a position to sue the relative estate. These and kindred expressions, have, however, been held to have no such effect, and indeed to be without any legal significance. (See the observations of Braund, J., in *Mahanth Singh v. U Aye* (*supra*), at p. 339, and of Ameer Ali, J., in *Zubaida Sultan v. Dawood Ismail Makra*, [1937] 1 Cal. 99.)

It follows that, in order to bind such an estate as we are now considering, the party seeking so to affect it with a contractual obligation arising out of a transaction between himself and the relative trustee, must either have obtained a charge upon the property by virtue of some clause in the instrument of dedication, or through the instrumentality of the Court, or must be so placed as to be able to have recourse to the doctrine of subrogation. But that doctrine only avails where the circumstances are such as would entitle the trustee to an indemnity out of the estate in respect of the particular transaction. (*Sailendra Nath Palit's* case (*supra*) at p. 209; *Mahabir Prosad Marwari v. Syed Shah Mohamed Yehia*, [1935] 15 Pat. 88.) The reader will see in this but another example of the principle, much earlier stated in this treatise, that the relationship of an indemnifier and the person to be indemnified may give rise to a claim through the latter person to be subrogated to that latter person's right to the indemnity sought. Such a claim to be so subrogated may arise where what the creditor has supplied or done has been something enjoyed by the estate, though delivered or carried out, as the case may be, at the instance of the trustee. Speaking of this principle as available to creditors, both of trustees or executors, Braund, J., at p. 342 of the case above cited put the matter thus: "I have said that a creditor's remedy is against the executor or the trustee personally and not against the estate. The right of a creditor to be subrogated to the executor's or the trustee's right of indemnity constitutes no exception to this. Indeed, it is the logical outcome of this principle, because it is not until the personal liability of the executor or the trustee has been recognised, that any right of indemnity can arise on which the doctrine of subrogation can operate."

**Manufacturers.**—Upon general principles it would seem that a person who has contracted to "make" something has an insurable interest in the thing he is constructing, to the extent, at any rate, of the value of the work, labour and materials expended. It is said by some writers that his interest may extend to the mercantile value of the thing made, and that such an interest does not determine until it passes to him to whose order it is being made.<sup>1</sup> At any rate, in America a builder has been held to have an insurable interest in the house he is building for a stipulated price, and not the less so that he may have received part payment therefor. (*Commercial Fire Insurance Co. v. Capital City Insurance Co.*, [1886] 60 Am. Rep. 162.) An American Court has also decided that an insurable interest is created in a factory itself by a right to a royalty from the manufacturing business conducted there. (*National*

<sup>1</sup> Porter, *Laws of Insurance*, 8th Ed., p. 65.

*Filtering Oil Co. v. Citizens' Insurance Co. of Missouri*, [1887] 60 Am. Rep. 473.)

**Rents, profits, shares.**—From the decision in *Palmer v. Pratt*, [1824] 2 Bing. 185, has been drawn the inference that where the assured's interest lies not in a right legal or equitable in the property itself, but arises incidentally, or from some contract concerning the property, what may be assured is not the property but the risk of losing something which the preservation of the property would enable the assured to enjoy. He must then state what it is that is really at risk so far as he is concerned, and must insure whatever that is *eo nomine*. (*M' Swiney v. Royal Exchange*, [1850] 14 Q.B. 634; *Halhead v. Young*, [1856] 6 E. & B. 312.) To assure at all on profits, if a person have no legal or equitable title to the property, he must at least have a valid and subsisting contract relating to it. (*Knox v. Wood*, [1808] 1 Camp. 544; *Stockdale v. Dunlop*, [1840] 6 M. & W. 224.) So an insurance merely on property will not, *per se*, cover loss of profits. (*Grant v. Parkinson*, [1781] 3 Doug. 16; *Eyre v. Glover*, [1812] 16 East 218; *Anderson v. Morice*, [1875] 10 C.P. 609, 622, 624.) Similar principles govern the insurance of the rent of any species of property, and a shipowner's or charterer's freight. Likewise an agent insuring his commission must do so *eo nomine*. A man may always insure against the loss of profits to be expected from some adventure or undertaking, or from his ordinary business or profession, but express description is necessary and a reasonable expectancy, in a business sense, must be shown. (*Wright v. Pole*, [1834] 1 Ad. & E. 621; *Macaura v. Northern Assurance*, [1925] A.C. 619.)

The English and American Courts have taken widely different views as to the capacity of a shareholder to insure. They are, however, agreed that he can insure his own shares and his dividends thereon: the English Courts applying the principles noticed above in regard to analogous interests by laying it down that he must specify the nature of his interest and insure it *eo nomine*. (*Paterson v. Harris*, [1861] 1 B. & S. 354, 355; *Wilson v. Jones*, [1867] 2 Ex. 139; *Macaura v. Northern Assurance Co.* (*supra*).) The divergence has occurred with regard to a shareholder's capacity to insure the property of the company. The last-named case decided that neither a shareholder nor a simple creditor could insure either the property as a whole or any particular asset of the company, and that this was the true view of the matter even if the company be a one-man concern and he be its sole shareholder. The contrary view has been maintained in America, where, in *Riggs v. Commercial Mutual Insurance Co.*, [1890] 21 Am. St. Rep. 716, it was held that a stock-holder has an insurable interest in the corporate property, and that when he so effects an insurance on it he need not specify his interest. Though, in one case, an obstacle to his so doing appeared in the form of a condition in the policy whereby the assured was required to have "an unencumbered fee" simple in the property insured, and that the policy was void for breach of that condition. (See *Mannheim Insurance v. Hollander*, [1901] 112 Fed. Rep. 549; *Phillips v. Knox County Insurance*, [1870] 20 Ohio 174; *Warren v. Davenport Fire*, [1871] 31 Iowa 44.) In Canada there has been exhibited a tendency to accept the American view-point. (*A. G. Peuchen Co. v. City Mutual Fire*, [1891] 18 Ont. A.R. 446.) The Courts in India would appear to be free to adopt either opinion. Should they feel disposed to follow in the path of the trans-Atlantic decisions they would, after all, be doing no more than expressing an inclination towards finding in favour of an insurable interest, and to that extent at any rate,

they would be thus leaning in a direction towards which the Courts in England have long inclined.<sup>1</sup>

**Statement of Interest.**—It is constantly said by text-book writers that as a general rule an assured is not required to state the nature of his interest in the subject-matter of insurance. The reader will, however, have observed that proposers whose property at risk consists of rents, profits and shares are obliged by circumstances to distinguish the profits or shares (as the case may be) from the house property or from assets of the company which provide the subject-matter they desire to protect. But these circumstances do not in reality amount to an exception to the rule as ordinarily stated, inasmuch as proposers so circumstanced are not really stating the nature of their interest but are merely, like all other proposers, describing with sufficient particularity the property at risk.

**Bottomry and Respondentia.**—Lenders on bottomry or *respondentia* bonds have manifestly an insurable interest in the ship or merchandise the subject-matter of these transactions. In a previous chapter the nature of these transactions has been described and two Indian cases cited, in one of which a Bombay custom akin to a transaction in the nature of a *respondentia* was held to create an insurable interest, both in ship and goods.<sup>2</sup>

## 7. Description.

There is probably no branch of insurance business in which accuracy in describing the subject-matter of the proposed insurance is more necessary than it is in fire insurance. It is plain enough that where the object of the contract is, amongst other things, to afford the basis for a possible claim, the thing whose loss or damage by fire would give rise to such a claim should be identified with certainty as coming within the scope of the contract. It should require no decisions of the courts—though there are many—to support so obvious a proposition. But in fire insurance, as in some other forms of insurance, a description, adequate for the purposes of identifying the property injured, may be insufficient for other reasons. Plainly, there may well be many matters which should be included in the description, if the insurers are to appreciate the extent of the risks they are asked to cover. (*Quin v. National Assurance Co.*, [1839] Jones & Car. 316, 331.) The following circumstances are of this latter order:—

- (a) *In the case of buildings*: occupancy; trade or business carried on; any other particular user; the presence of specified objects either on the premises or sufficiently near to affect the risk; the user of any such object; the absence from the building or its neighbourhood of a specified object or objects.
- (b) *In respect of goods and chattels* (where the goods or any other kind of moveable property be housed or stored): under what supervision or personal protection; the proximity or otherwise of any other form of moveable property, whose propinquity might endanger them; whether, in the case of goods, they be held in trust or on commission.

<sup>1</sup> See the cases collected at p. 25, note (e) of Welford and Otter-Barry, *op. cit.*, 3rd Ed.

<sup>2</sup> See the cases cited and the discussion thereon in Chapter IV, p. 109, *ante*.

It is a matter for the parties to decide prior to the issue of the policy, how far the description necessary both for identifying the subject-matter of the insurance and for the other purposes named above should go. In practice, insurers indicate often by questions put during the stage of negotiation, and always by printed matter, what it is they desire to know about the property they are asked to cover. On the part of the assured (who during the period of negotiation is the "proposer") the law expects not only that he will meet the requisitions of the insurer with accurate information, but that he will display the utmost good faith to the extent of supplying a description sufficient to enable the other party to appreciate the true risks. Thus, he should not omit from his description anything which he knows, or must be taken to know, would affect the mind of the insurer either towards accepting the risk at all or in fixing the premium. So it is that the duty of providing a sufficient description belongs to the doctrine of disclosure, which, in turn, is itself comprehended in the doctrine of *uberrima fides*.

The student must not suppose, however, that the provision of an adequate description necessarily involves anything elaborate in that regard. It is a question of fact in every case whether, for the object contemplated by the contract, the description given is sufficient to enable the insurer to identify the property and to appreciate the risk. (*Birrell v. Dryer*, [1884] 9 A.C. 345, 352; *Hare v. Barstow*, [1844] 8 Jur. 928, 929.)

In practice, insurers frequently inspect premises which are the subject-matter of a proposal for fire insurance, whether the policy sought is intended to cover the premises, or only certain moveables therein, or both. Where, on contest, it turns out that such an inspection was made prior to the issue of the policy, nice questions sometimes arise as to how far the applicant need have supplied information concerning matters which he might reasonably suppose that the insurers in the course of such inspection would have obtained. (*Re Universal Non-Tariff Fire, Forbes & Co.'s claim*, [1875] L.R. 19 Eq. 485.) Where an agent thus obtains information for the insurer, and the description based upon such information turns out to be inaccurate or inadequate, the insurers are generally estopped from relying upon any such inaccuracy as may find its way into the policy ultimately issued. (*Biggar v. Rock Life*, [1902] 1 K.B. 516; *Re Universal Non-Tariff Fire (supra)*, following *Parsons v. Bignold*, [1846] 15 L.J. Ch. 379.) In *Golding v. Royal London Auxiliary Insurance Co.*, [1914] 30 T.L.R. 350, the facts were that on a proposal by the plaintiff to insure his shop and residence against fire, the insurance agent himself filled up the form with answers to questions which the plaintiff did not read before signing it. Later, however, he read a duplicate which had been left with him. When eventually the plaintiff claimed on the policy, the insurers set up as a defence the incorrectitude of a number of answers in the proposal form, pleaded that the same were warranties, and, alternatively, that they constituted misrepresentations of material facts. It was held that the duty of the agent was to convey the answers to his employers, and any corrections to the answers came within his duty. The plaintiff succeeded. In *Ayrey v. British Legal & United Provident Assurance Co.*, [1918] 1 K.B. 136, the material facts were that the questions in the proposal form had been correctly answered. Certain additional information of a material character not mentioned in the proposal had been communicated to the insurer's agent who, in turn, communicated them to the insurer's manager of a district office. Premiums were duly paid until the assured's death. In the County Court, the insurers had succeeded on the

plea of non-disclosure of material information. The Divisional Court, on appeal from the County Court, held the omission not to invalidate the policy: one Judge (Lawrence, J.) holding that the knowledge of their District Manager must be imputed to the insurers, and secondly that by acceptance of the premiums, they must be taken to have waived any objection to the validity of the policy; the other Judge (Atkin, J.) adding that the defendants, by accepting the premiums, were estopped from taking advantage of any breach of the conditions, and in so holding relied upon *Bentsen v. Taylor*, [1893] 2 Q.B. 274, 283.

If, however, the agent of the insurers be employed merely to transmit unchecked information furnished by the proposer or the latter's servants, he is treated as the agent of the proposer and not of the insurer. In such a case, if the description of the property so transmitted be inaccurate or insufficient, the effect of such inaccuracy or insufficiency, whatever that effect may be, must be borne by the assured, who is concluded by the description he has thus furnished. The *onus*, however, of proving the inaccuracy lies with the insurers. (*Baxendale v. Harvey*, [1859] 4 H. & N. 445, 451.)

The facts in *Dunn v. Ocean Accident & Guarantee Corporation*, [1933] 50 T.L.R. 32, afford a good example of how an insurer's representative may so act as to be treated entirely as the claimant's agent, and his knowledge *not* to be imputed to the insurers. A Mr. Hunt had been secretly married to a Mrs. Dunn (the plaintiff); and he had given her, as a present, a motor-car which eventually became the subject-matter of the policy sued upon. Hunt was an agent of the insurers, and submitted the proposal form for Mrs. Dunn. Hunt was killed in an accident to the insured car. It then transpired that Hunt had been married to the plaintiff; and that he himself had been involved in a number of accidents. Avory, J., held Hunt to have acted as the plaintiff's agent, and not as the agent of the insurers. The insurers succeeded in the action. The Court of Appeal upheld this decision. In the course of his judgment, Lord Hanworth, M.R., observed that "it was difficult to see how Mr. Hunt, by acting in defiance of his duty to the defendants, was able to authorize the plaintiff to forego her duty to disclose such very material facts".

The extent to which incorrect answers to questions when taken down by the insurer's agent should, in fairness, be held to bind the insurers, was specially considered by the Court of Appeal in *Newsholme Bros. v. Road Transport and General, etc.*, [1929] 2 K.B. 356. The policy was one for a motor-car insurance; the subject-matter being a motor omnibus. In the proposal form the answers to specific questions had been filled in by the insurers' agent; the proposal was made the basis of the contract; and the answers were warranted as true. In fact, however, many of them were incorrect. On action brought, the insurers sought to avoid the policy on the ground of misstatement and non-disclosure. Arbitration proceedings followed: the arbitrator finding, *inter alia*, that many of the answers were untrue; that the agent was told the true facts; and that it did not appear why he did not write the answers down correctly. The arbitrator also found as a fact that the agent had authority to procure insurances, to obtain duly filled-in and signed proposal forms, and to receive premiums; but that he had no authority to fill in proposal forms himself. On the matter coming into court, Rowlatt, J., dismissed the claim. On appeal, the decision of Rowlatt, J., was upheld. Scrutton, L.J., in the course of his judgment pointed out, that, on the findings of the arbitrator, the agent was not acting

within the scope of his authority, and consequently that, when writing down the answers, he was acting wholly as an agent of the assured, and that it was therefore immaterial whether he had written down incorrect answers intentionally or whether the inaccuracies were the result of his misunderstanding the questions or the answers, or arose from forgetfulness of what he was told. On the question of liability for incorrectitude where the insurer's agent at a proposer's request fills up the answers to questions in purported conformity with information supplied by the proposer, the Lord Justice presented his view in the form of a dilemma. If the insurer's agent when so conducting himself *knows* the answers which he is writing down to be untrue, he is committing a fraud which prevents his knowledge being imputed to the company; while, if he does *not* know that the answers are untrue, there is no knowledge to be imputed.

**Locality.**—Locality often has an important bearing upon the propriety of a description. In the case of buildings, a description will be inadequate which does not sufficiently identify the locality. It may be otherwise in the case of goods, though the topic may be of the greatest importance with regard to the propinquity of something which may place the goods at a hazard which would either not be contemplated by the insurers without an added premium, or which, if not properly described, may involve a breach of warranty or at least a breach of a condition.

In fire insurance, conditions designed to exclude risks of a particular character in relation to measured distances are not infrequently met with. Thus, for example, in Canadian and American fire policies, conditions such as that there should be no railway passing through or within a prescribed distance from a particular property at risk, or that the property should be entirely surrounded by arable land, or again that no standing wood, scrub or forest should be within a specified distance, are common.

**Goods : genus and species.**—Insurance of goods and of any other moveables in general terms will, unless the intention of the parties is otherwise to be gathered by the policy read as a whole, cover any other goods or moveables of that kind and quantity. In other words the identical moveables covered at the time the policy attaches may wholly or partly have been removed and their place taken by others, in which case the moveables so substituted will be fully covered by the words of general description. Were it otherwise, perishable goods or expendable stores could never be insured except under conditions intolerable to commercial life and dealings.

On the other hand, where, by the terms of the policy, specific goods or other specific moveables are so described as plainly to identify and to refer to those identical things and none other, anything substituted therefor will not be covered, though, in a general sense, they answer the description.

**Misdescription and no misdescription.**—In what follows, the reader is presented with a number of examples where the Courts, in the case of premises and goods, have held that there has been material misdescription. These examples may usefully be compared with others, similarly arranged, where the Courts have held the description complained of not to amount to such a misdescription as would vitiate the relative policy.

*Misdescription :—Premises.*

(i) Address not of the premises but of the person effecting the insurance, inadequate. (*Grover & Grover v. Mathews*, [1910] 15 Com. Cas. 249.)

(ii) House described as "in course of construction". In fact, work abandoned before proposal and not resumed. Description held to imply "in process of construction", and so a misdescription. (*Dodge v. Western Canada Fire Insurance Co.*, [1912] 20 W.L.R. 558.)

(iii) Building described as "two-storeyed"; when, at the date of the policy, which was retrospective, it was three-storeyed. (*Sillem v. Thornton*, [1854] 3 E. & B. 868.)

(iv) "Constructed of brick walls in the ground storey"; where, in fact, the walls on that floor consisted of one wooden wall, two brick walls and two walls so constructed as to be one-third of brick and two-thirds of timber. (*Dawson's Bank Ltd. v. Vulcan Insurance Co.*, [1934] 39 C.W.N. 270 P.C., affirming a decision of the Court of Appeal in Rangoon.)

(v) Premises described as "a dwelling house occupied by a caretaker", which, in fact, was unfinished and unoccupied except by a carpenter, who worked there by day only. (*Quin v. National Assurance Co.*, [1839] Jones & Car. 316 (see p. 237, ante).)

(vi) A warranty may affect a description; as where a mill was held not to be of the class warranted. (*Newcastle Fire Insurance Co. v. Macmorran & Co.*, [1815] 3 Dow. 255 (H.L.).)

*Misdescription :—Goods.*

(i) Stock-in-trade consisting of "corn, seed, etc.," held not sufficient to include "hops". (*Joel v. Harvey*, [1857] 5 W.R. 488.)

(ii) Stock of Linen Drapery not described by the word "stock-in-trade", where the insured was not a Linen Draper. (*Watchorn v. Langford*, [1813] 3 Camp. 422.)

(iii) Linen Drapery not within the words "Household furniture, linen, and wearing apparel", where the context showed the word linen to be household linen. (*Scott v. Globe Marine Insurance Co.*, [1896] 1 Com. Cas. 370.)

(iv) "Tools", of a flour mill, would not include paper bags. (*Hutchison v. Niagara Dt. Mutual Fire Insurance Co.*, [1876] 39 Can. Q.B. 483.)

(v) "General merchandise" would not include stock of valuable fur. (*Herman v. Phoenix Assurance Co.*, [1924] 18 Ll. L.L.R. 371 C.A.)

(vi) "Goods" does not include wearing apparel or personal effects. (*Ross v. Thwaites*, [1776] 1 Park 23; *Brown v. Stapylton*, [1827] 4 Bing. 119.)

*No Misdescription :—Premises.*

(i) The word "barn" not the best description, but held to give insurers substantially the nature of the premises at risk. (*Dobson v. Sotheby*, [1827] M. & M. 90, 92.)

(ii) House reasonably described as a "private residence" though only occupied for a part of the year. (*Mathys v. Strathcona Fire Insurance Co.*, [1920] 58 Q.R.S.C. 199.)

(iii) A description of a mill as "worked by day only" was held accurate where the mill proper was so worked, although it was found that a steam engine in the mill premises was worked during the night.

(*Whitehead v. Price*, [1835] 2 C.M. & R. 447.) This case was approved in *Mayall v. Misford*, [1837] 6 A. & E. 670.

(iv) A building was unfinished and was lathed on the outside only. Specific questions had been put, whose scope did not include any matter of this kind. The policy was not avoided. (*Laidlaw v. Liverpool, London & Globe Insurance Co.*, [1867] 13 Grant (U.C.) 377.)

(v) Building described as "built of brick and slated". One of the buildings, however, was roofed not with slate, but with tarred felt. Misdescription held immaterial. The ratio of this decision (which naturally applies only to the facts of the case) depended upon the circumstances that everything was roofed with slate except one very small building, and that the insurer's agent had inspected the premises and no objection had been taken to the inaccuracy subsequently relied upon. (*Re Universal Non-Tariff Fire Insurance Co., Forbes & Co.'s claim*, [1875] L.R. 19 Eq. 485.)

*No Misdescription :—Goods.*

(i) Described as "in the assured's dwelling house". They were in a room wherein assured was lessee of that room only. (*Friedlander v. London Assurance Co.*, [1832] 1 M. & Rob. 171.)

(ii) In the absence of an exception, "money" would be included in "goods". (*Da Costa v. Firth*, [1766] 4 Burr. 1966.)

(iii) Stock of groceries may include liquor. (*Nicholson v. Phoenix, etc.*, [1880] 45 Can. Q.B. 359.)

(iv) "All Church furniture and fixtures" will include a chime of bells. Incidentally, the latter held no part of the fabric of the Church. (*Frederickton (Bishop) v. Union Assurance Co.*, [1911] 10 E.L.R. 243.)

(v) All fixed and moveable machinery held included in the descriptive words "Grist mill". (*Shannon v. Gore District Mutual Fire Insurance Co.*, [1878] 2 Tupper's R. (U.C.) 396.)

**Ownership.**—A husband describing himself as the "owner" of property which is in fact his wife's, is guilty of a misdescription. In some two recent cases the question had arisen as to whether one who is acquiring something under a contract of hire-purchase can rightly describe himself as the "owner" for the purpose of effecting an insurance upon it. Apparently he can. See *Arlet v. Lancashire & General Insurance Co.*, [1927] 27 Ll. L.L.R. 454, and the unreported decision of the Court of Appeal in England of the 6th of July, 1921, reversing the decision of Bailhache, J., in *Banton v. Home and Colonial Insurance Co.*, [1921] (*The Times*, 27th of April).

## 8. Disclosure.

As already pointed out, a proper disclosure is, in large measure, an application of the rule of good faith, a breach of which entitles the insurer to avoid the policy. The incidence of that rule has been more than once referred to in the foregoing chapters of this treatise.<sup>1</sup> But it is obvious that the discharge of the duty itself must to a large extent be conditioned by the nature of the contract. Contracts of fire insurance are today entered into by persons for the most part sufficiently well acquainted with the dangerous nature of fire to be well able to judge what a potential insurer should be told. True, there may be instances,

<sup>1</sup> See pp. 18, 89-91.

especially in domestic insurance, when a proposer will find himself in some doubt as to the significance or otherwise of a particular fact. Likewise, there may be occasions when he will forget a material circumstance, or perhaps not recognise it for what it is. Modern insurance undertakings, however, guard themselves and their proposers against unintentional non-disclosure, by the framing of a number of apt questions in writing, the answers to which, if intelligently and honestly given, should place the insurer in possession of what he wants to know.<sup>1</sup>

The following are instances of circumstances sufficient to avoid a policy if left undisclosed :—

In an insurance of a motor car against fire, the structure and locality of the garage (*Dawson Ltd. v. Bonnin* (p. 90, *ante*) at p. 429); in the case of moveables, that some portion of the building where they are stored is used as a kitchen or is adjacent to a furnace; that the assured had made previous claims in respect of loss by fire, or even that his property had previously sustained damage by fire (*Rozanes v. Bowen*, [1928] 32 Ll. L.L.R. 98 C.A. *per* Scrutton, L.J.); that other insurers had refused to renew fire policies for him (*Re Yager and Guardian Assurance Co.*, [1912] 108 L.T. 38); or that a previous policy had been cancelled (*Fine v. General Accident Fire & Life Assurance Corp.*, [1915] S.A.R. (A.D.) 213). Suspicion as to the conduct of anyone in whose charge or control the property at risk is left must be disclosed. (*Milcher v. Kingwilliamstown Fire & Marine Insurance Co.*, [1883] 3 Buchanan (East. Dist. C.T. Cape.) 271.) So, too, in the case of goods entrusted to a carrier, it is material that the assured has entered into a special contract limiting the latter's liability. (*Tate v. Hyslop*, [1885] 15 Q.B.D. 368.) In insurance against loss of profits, it is material that the proposer is trading at a loss. (*Stavers v. Mountain*, [1912] *The Times*, 27th July, C.A.)

The reader who has followed the topic of disclosure as the same has been dealt with earlier in this treatise, will have realised the disposition of the Courts in India to adhere to and apply the principles which have commended themselves to the Courts in England in this regard. For the purpose of the present chapter it is thought, therefore, that a single instance should suffice. In *Imperial Pressing Co. v. British Crown Assurance Corp. Ltd.*, [1913] 41 Cal. 581, the material facts were that on the 17th February, 1912, the plaintiff company had obtained a cover-note in respect of certain premises (in the nature of godowns) giving *ad interim* protection against losses by fire. Four days later a fire broke out, resulting in considerable damage to the godowns and

<sup>1</sup> As an example of how a plain question evasively answered may vitiate a policy, see the Australian case of *Bradbury v. London Guarantee & Accident Co., Ltd.*, [1928] W.A.L.R. 38. In that case, the plaintiff had signed two separate proposals for Fire Insurance. Each proposal form contained the simple question, "Have you or your husband ever been a claimant on a fire insurance office or had a fire?" On one form the lady answered this question as follows: "Fire in 1914 from adjoining shops, Throssell Street, Collie."; while on the other form, the answer she gave was, "known to company". The material facts were that the plaintiff had for many years lived apart from her husband, who had died in 1923. The husband had had one fire in 1898 when he had been convicted of arson. He had had a second fire in 1917; and the insurers in that case had refused to pay him his claim. Although the plaintiff's proposal had not been made till 1925, *i.e.*, two years after her husband's death, the Court held the untrue nature of her answers to dis-entitle her to succeed. See, also, *Locker and Woolf Ltd. v. Western Australian Ins. Co.*, [1937] 7 Comp. Cas. 13, where the question was "Has this or any other insurance of yours been declined by any other company?" The policy was in respect of stock and fixtures. The policy was avoided because the assured answered the question in the negative, although he had been refused a policy for another type of insurance.

the jute which they contained. As a defence to the claim subsequently made upon the basis of the said cover-note, non-disclosure was pleaded in respect of a number of alleged material circumstances. It was said that the property at risk was in use and occupation of a firm whose name had not been disclosed; that the said firm enjoyed an unenviable reputation in that they were rumoured to be inclined towards acts of incendiarism for dishonest purposes; and that the firm's said reputation had not been disclosed; and, finally, that the plaintiff company had been specifically warned by reputable persons of the probability of an incendiary fire being started at or near the insured premises; that the said warning had reached them prior to the plaintiff company's application for cover, and that they had not communicated it to the insurers. The Court found, as facts, that the insurers themselves were at all material times aware of the user pleaded and of the said firm's undesirable reputation, and consequently it applied the principle that no grievance could be made of non-disclosure of information which insurers themselves possessed. On the other hand, the Court regarded the non-disclosure of the warning, which it found as a fact the assured to have received, as entitling the insurers to avoid the policy. In the course of the hearing certain Canadian cases were cited to the Court; *Greet v. Citizens Insurance Co.*, [1880] 5 Tupper's R. (U.C.) 596, C.A., which was a case of threats undisclosed to the insurers, and *Kelly v. Hochelaga Fire Insurance Co.*, [1880] 24 L.C.J. 298 which the Court distinguished on the facts; for, in the latter case, it had been considered that the threats were of an idle nature which need not have been taken seriously. Obviously, if the plaintiff company in the Calcutta case under discussion had known of the reputation enjoyed by the firm using the insured premises and the insurers had not, such non-disclosure would have been a breach of the rule of good faith and on that ground also the insurers would have been entitled to avoid the policy.

A recent decision of the Courts in England (though not involving a contract of fire insurance) affords a striking example of a principle of general application touching disclosure. In *Holl's Motors Ltd. v. South East Lancashire Insurance Co.*, [1930] 35 Com. Cas. 281 C.A., the material facts were, that the plaintiffs were in possession of a motor car under a hire-purchase agreement by which they were obliged to insure it with a named insurer. The plaintiffs made use of a firm of brokers, who were told by the insurers that they refused to insure and giving their reasons. Instead of communicating this refusal to the plaintiffs the brokers told their clients (quite untruly) that the insurers did not cover that class of car. The brokers then obtained an insurance with another company, and when this insurance had expired, the latter wrote intimating that they would not renew. It so happened, however, that neither the plaintiffs nor their brokers had asked for a renewal. An insurance was then effected with yet a third company, in whose proposal form the question was asked "whether any company or underwriter had declined to insure". To this the plaintiffs replied in the negative. By an action on the policy the insurers pleaded that the foregoing answer was untrue and they claimed to avoid the policy. That defence succeeded. On appeal, the Court held the answer to have been untrue and the fact that the appellants were unaware of the first refusal to be immaterial. It further held that there was a refusal also on the part of the company which had declined to renew, and that the fact that the company had not been asked to renew was a circumstance irrelevant to the issue. Accordingly, the judgment of the Court of first instance was affirmed.

9. *Alteration of risk.*

For more than a century insurers have been striving to devise, by means of ingenious phraseology, methods of protecting themselves against such results of altered circumstances as may involve them in the payment of claims. The truth is that Man finds himself in an unstable (yet frequently contracts with his fellow man on the basis of a static) universe. On the one hand, from the point of view of the insurer, it seems unfair that he should pay a claim arising from circumstances which did not exist when the parties entered into the contract, and which such parties would be obliged to admit in fact increased the risk from the moment when those circumstances first obtained. On the other hand, it is equally unfair to an assured if his security varies with the real risk; for then he has no security at all. It was Lord Ellenborough who in 1808 recognised it as impossible to say that everything which increased the risk would vacate an insurance. "Or," said he,—thinking of the merchant ships of those days, which for the purposes of firing signals and not infrequently for purposes of defence had to sail with a certain amount of dangerous stores—"this effect would be produced by taking on board a cask of gun-powder or any other inflammable matter." (*Toulmin v. Inglis*, [1808] 1 Camp. 421, 422.) Fifty years later Chief Baron Pollock put the difficulty in even more picturesque language. "A person," said he, "who insures, may light as many candles as he pleases in his house, though each additional candle increases the danger of setting the house on fire." (*Baxendale v. Harvey*, [1859] (p. 239, *ante*), at p. 452.) Consequently, unless the policy by means of apt words expressly provides to the contrary, an alteration in circumstance, not sufficient to affect the original description of the property at risk, will not avoid the policy, even though such altered circumstances may materially increase the risk. (*Thompson v. Hopper*, [1858] E.B. & E. 1038.) Even an alteration effected by the assured himself, if made with no fraudulent intent, and such that the identity of the property is not impaired, will not, unless forbidden by the policy, in any way vitiate it. (*Ibid.* at p. 1049.) Willes, J., considered, however (*ibid.*), that where an alteration is so extensive as to destroy the identity of the subject-matter, the policy is avoided. Now, identity is determined by the description; and, consequently, where a particular locality is the essence of a description, the removal of goods, the subject-matter of the insurance, from that locality, severs the attachment of the policy; nor will such attachment be renewed by the mere fact of returning the property insured to the locality originally named in the policy. It is otherwise, however, where, from the nature of the contract of insurance, the removal from one place to another or through a chain of places (as in the case of samples, carried by commercial travellers) was something contemplated by the parties. For then it will be a question of interpretation whether the operation of the policy was intended to be suspended and renewed, or to continue during the passage of the property from place to place.

In the absence, then, of some form of apt stipulation to the contrary, a policy of insurance against fire does not operate so as to restrict the assured in the use and enjoyment of his property, even though some particular user—not even excepting the introduction of dangerous goods—may, in fact, materially increase the risk. (*Pim v. Reid*, [1843] 6 M. & G. 1, 22.) There was a time in the history of the law relating to insurance in England when difficulties arose over the views attributed to certain judges in *Barrett v. Jerny*, [1849] 3 Ex. 535, and *Sillem v.*

*Thornton*, [1854] 3 E. & B. 868. These difficulties, if any, are little more than of academic interest today, since it is the practice in modern commercial transactions of the character we are studying to insert special conditions limiting and safeguarding the risks which the insurers are prepared to accept where circumstances materially alter after the execution of the policy. It is proposed to deal later in this chapter with standard conditions of the type alluded to.

For the purposes of the present section of our work there remains only to point out that where an alteration of the risk is made fraudulently or in breach of good faith, the policy may be avoided. So, in a South African case, the assured who had all along intended to use the insured premises as a canteen,<sup>1</sup> deliberately insured it as a "store".<sup>2</sup> The assured really opened the premises as a canteen, and a fire having broken out there and the assured having made a claim, the policy was held avoidable and the insurers succeeded. (*Jenssen v. Commercial Insurance Co.*, [1885] 4 Juta's R. (Cape) 20.)

### 10. The Premium.

The place which payment of the agreed premium occupies in a contract of insurance has already been discussed earlier in this treatise.<sup>3</sup> An insurer, as has already been pointed out, may, if he choose, stipulate that no risk will attach until he shall have received the premium. Such a stipulation, if made, may, of course, be waived. On the other hand, once the contract has come into force, payment of the agreed premium has got to be made sooner or later; for, otherwise, the contract would be without consideration; and a loss, if paid, would in such circumstances be a mere *ex gratia* payment. It is not to be supposed therefore that waiver of pre-payments is the same thing as waiver of payment, and that an insurer who so waives pre-payment is gratuitously undertaking the risk. The fact that no claim has been made under a policy, coupled with non-insistence upon pre-payment, does not extinguish the insurer's right to payment of the premium; for a contract of insurance is such that each party may compel the other to perform his allotted part thereunder. It is, however, possible for an insurer so to phrase a condition in a policy as to disentitle himself in certain circumstances to sue upon it. Such was the situation in *Equitable Fire and Accident Office Ltd. v. Ching Wo Hong*, [1907] A.C. 96, where the policy contained an express stipulation that the contract did not become effective until the premium had been actually paid. Thus, as the premium had not in fact been paid, the insurers were held to the terms of their stipulation and were unable to recover. See also *South British Insurance Co. Ltd. v. J. R. Stenson*, [1928] 52 Bom. 532.

The right of an insurer to obtain payment of his premium by a suit was considered in two recent cases in India by the High Courts

<sup>1</sup> A place of refreshment: usually but not necessarily where intoxicants can be consumed, but where smoking will certainly be allowed.

<sup>2</sup> A word used in the United States of America and in many of the British Dominions for what in the British Isles is called a "shop". In the British Isles the word "store" or "stores" has always denoted a shop where more than one kind of retail trade is carried on. In the early colonial settlements all shops were of this type, and the word has now remained as descriptive of the business premises of any retailer.

<sup>3</sup> See pp. 80, 81, 146, *ante*.

of Allahabad and Rangoon. (*Hari Kishan Das v. Guardian Assurance Co.*, [1934] 4 Comp. Cas. 51, and *U San Dun v. New Zealand Insurance Co. Ltd.*, [1934] 5 Comp. Cas. 55.) In the latter case the material facts were that the policy did not contain the kind of stipulation to which reference has been made above; that it contained a recital of payment of premium amounting to Rs. 42-8-0; that, in fact, it had been issued to an intermediary, who had brought the business to the local office of the insurers, for transmission to the appellant. The insurers alleged that, in fact, no premium had been received; and they sued for payment accordingly. In the Court of Small Causes the assured set up a number of defences including estoppel. He first pleaded payment to one Maung Po Kun (the said intermediary), as to an agent of the insurers, and contended that such payment was payment to the latter. In the alternative, he pleaded that if no payment had been made, there was no contract, and so nothing to enforce. He also relied upon the recital of payment which appeared in the policy itself as estopping the insurers from setting up a case of "no payment". The Court of first instance dismissed the suit and the defendant invoked the quasi-appellate jurisdiction of the High Court to "revise" the decision. Mackney, J., disposed of the matter by accepting the judgment of the Court of first instance to the effect that the assured had produced no receipt covering his alleged payment, and that, in any event, the person to whom payment was alleged to have been made had no authority to collect money on behalf of the insurers; and he held that in the absence of any stipulation to the contrary, the contract was complete the moment the policy was delivered, and the company thus became entitled to payment of premium and to recover the same by suit. In disposing of the point of estoppel the Court applied the reasoning of the Privy Council in *Equitable Fire & Accident etc.*, [1907] (p. 246, *ante*) at p. 100, where, on a similar plea in regard to the words "having paid" which usually appear in policies drawn on the Lloyd's model, it is said: "It is familiar law that in equity a vendor was never held to be estopped by a statement in the conveyance that the purchase-money had been paid, or even by an indorsed receipt for the money signed by him, so as to exclude the enforcement of the vendor's lien. Their Lordships think that in any case the parties should not be held in equity to be estopped as between themselves from showing that the consideration had not in fact been paid".

The facts in the Allahabad case were simpler. The interest of that case lies in the circumstance that the matter in controversy was the nature of a contract of insurance created by a cover-note only. It was held that, on the receipt of the intimation given by the insurer to the assured that the risk was covered, there was a valid contract between the parties which could be enforced, notwithstanding the fact that no policy in the usual form had been issued and no premium had been paid; and the insurers were therefore entitled to recover the proportionate premium.

### 11. The Policy.

**Form.**—As already observed earlier in this chapter the experience of insurers the world over has led to a considerable amount of standardization in the conditions which are now-a-days insisted upon by those who are undertaking fire insurance. Most of the so-called "standard" forms are now in use in British India. Others, though specially designed for the Indian insurance market, have adopted features which have been found to work well elsewhere.

The common English form describes<sup>3</sup> the written contract as an *Instrument or Policy of Assurance* and as witnessing that:—

*In consideration of (the assured) paying to (the insurers) the sum of Rupees for Assuring against Loss or Damage by Fire or Lightning as hereinafter mentioned the Property hereinafter described in the Sum or several Sums following (here the sum assured is stated in figures and words and there follows a description of the property to be covered by the contract) The (insurers) hereby agree with the Assured (but subject to the conditions printed on the back hereof which are to be taken as part of this policy) that if the Property above described shall be destroyed or damaged by Fire or Lightning the (insurers), out of their (funds) shall be liable to pay or make good unto the Assured the value at the time of the happening of such loss of the property so destroyed or the amount of such damage, which shall or may happen between the day of 19, and Four o'clock in the afternoon of the day of 19, or before Four o'clock in the afternoon of the last day of any subsequent period in respect of which the Assured shall pay, and the (insurers) shall accept, the Sum required for the renewal of this Assurance to an amount not exceeding in respect of the matter or matters above specified, the Sum or Sums set opposite thereto respectively, and not exceeding in whole the sum of Rupees*  
*Dated at the day of in the year One thousand Nine hundred and etc., and issued there.*

*By Order (etc.)*

In the above form it will be noted that payment of the premium is stated to be the consideration moving from the assured to the insurers; but that the policy does not follow the Lloyd's model wherein a recital of actual payment is usually to be found.

**Lightning.**—In this specimen policy mention is specifically made of lightning as a cause of loss or damage for which the insurers will be answerable. So far, the word "Lightning" seems to have given no trouble in the Courts. What constitutes injury by lightning has not, any more than has the word itself, been the subject of judicial definition. A shaft of lightning is, however, as everyone knows, capable under conditions favouring such a result, of setting fire to buildings or to particular articles forming part of their contents. If ignition is thus set up, damage by lightning is damage by fire. Where ignition is not the result, damage by lightning is not damage by fire, and must consequently be made the subject (as in the policy under examination) of a separate insurance. (*Kenniston v. Merchants' Mutual*, [1843] 14 N.H. 341.) The power of lightning to produce damage otherwise than by setting fire to the object it strikes is notorious. It will sometimes strip bark from a tree without igniting anything. It will split a stone in two. And it is known to char, and so to blacken, objects, without actually igniting them.

**The Indemnity.**—The student will note that the indemnity offered is so offered in an alternative form, the operative words being "*shall be liable to pay or make good... the value etc.*". It will be found from a study of the Conditions, to which reference will shortly be made, that the insurers reserve to themselves the option of making the indemnity in whichever of the two forms so offered happens the better to suit them. This provision of the contract attracts the notions of "re-instatement" and "exchange", of which mention has already been made earlier in this

chapter. It is proposed to deal further with the subject, when discussing the relative conditions.

## 12. The Conditions.

**Preliminary.**—The real measure of the risks undertaken by the insurers in a modern fire policy cannot in any degree be appreciated without a most careful study of those Conditions which, in most modern instruments of the kind alluded to, are to be found printed on the back thereof. It is usual expressly to attract those conditions by a reference to them on the face of the policy. The reader will note that such is the case in the specimen shown on the previous page. Among the considerable number of conditions which go to make up a modern contract of fire insurance, is usually to be found either a general stipulation that a breach of any of them will vitiate the policy, or a number of particular stipulations of like intent and purpose appended to respective conditions. The observations of a learned Lord Justice of Appeal in England in a recent case may serve to illustrate the importance, from the point of view of an assured, of thoroughly mastering the conditions in a policy before he accept them. The observations alluded to were made by MacKinnon, L.J., in delivering judgment dismissing the assured's appeal in *Welch v. Royal Exchange Assurance*, [1938] 4 All E.R. 289, at p. 296. "The arbitrator," he said, "has found that the assured ought to have produced these accounts, but that, when produced, they contained in fact nothing which justified, or tended to justify, a refusal to pay his claim. This means that the appellant had an honest claim for a large amount, but, by reason of his stupid obstinacy over an immaterial matter, he has enabled the respondents to refuse to pay anything. To lose any sum, however large, may be the proper penalty of dishonesty. To lose some £20,000 as the result of stupidity does seem excessive, even if it be true that the claimant has only himself to blame for that result. Yet how many people are there, even among lawyers, who read through their fire insurance policies? Everyone knows that he must possess such a document, but knows that the chance of his needing to use it is remote."

In a common form of fire policy, adopting the so-called "standard" conditions, one might expect to find those conditions grouped according to their subject-matter and arranged in some discernible logical order. But such arrangement is not always to be met with. And it not infrequently appears that an important subject is dealt with partly under one condition and partly under some other or others. Such an arrangement is manifestly inconvenient from the assured's point of view. In modern fire policies one usually finds upwards of twenty more or less standard conditions. An examination of such a policy offered by a leading company in India will serve to illustrate the foregoing observations.

### (i) *Payment of premium.*

In the specimen before us the following clause appears as No. 2:—

*"No payment in respect of any premium shall be deemed to be payment to the [Insurer] unless a printed form of receipt for the same signed by an Official or duly appointed Agent of the [Insurer] shall have been given to the Assured."*

This condition is drastic, and indicates that no receipt will be of any value to the assured which is not over the signature of some one with the

requisite authority. Thus a proposer may have obtained an *ad interim* cover and may, in fact, have paid for it; but where the cover-note, by an ingenious phrase, attracts conditions in the policy which the proposer has not yet seen, the latter may ultimately find himself met with the foregoing condition, if it should turn out that he has, in fact, paid some one who had not the requisite authority, or who had used an unauthorised form of receipt, or a receipt not signed by an "Official" or by a "duly appointed Agent" of the insurer. How, it may be asked, can a proposer know in advance who is a proper person to sign such a receipt?

Difficulties of this kind raise, on contest, questions of mixed law and fact. For an assured, in a proper case, may have recourse to the equitable doctrine of holding out.<sup>1</sup> This means that if the insurer has held out such a person, or permitted that person to hold himself out, as having authority to collect premiums or to sign receipts in the form offered to the assured, the insurer may be "estopped"<sup>2</sup> from setting up facts which would entitle him to make use of this particular condition in the policy.<sup>3</sup> Indeed in *Ram Pertab v. Marshall*, [1899] 26 Cal. 701, the Privy Council held a principal bound by a contract entered into by his agent, though in so doing the agent had exceeded his authority, on the ground that in the particular circumstances the other party to the contract might honestly and reasonably have believed in the existence of the authority to the extent apparent.

In the clause under examination the word "Official" must be taken to be the same as "officer" and to include anybody at the insurer's head office, and in the case of a foreign company, at his principal office in India, who ostensibly signs as the manager of that office, or ostensibly as "for" such a manager. The secretary of a corporation (but not necessarily a branch secretary) is an officer for the purposes of the condition. The words "duly appointed agent" will not include *any* agent, though duly appointed; the words "duly appointed" connoting, in this context, one whose agency extends to the collection of premiums and who has the power to give a valid discharge.

#### (ii) *What is not covered.*

The conditions which specify risks which the insurers do not undertake are styled "Exceptions". In the policy under examination, these succeed one another under clauses 4-9. They cover a very wide range of circumstances, any of which will exempt the insurer from liability under the policy. It will be useful to treat each risk so excepted under its appropriate subject-matter.

**A fall.**—This topic is dealt with under clause 4, which reads as follows:—

*"All assurance under this Policy*

- (1) *on any building or part of any building,*
- (2) *on any property contained in any building,*

<sup>1</sup> This doctrine, which, in its effects, creates a liability by estoppel, is the subject-matter of sec. 237 of the Indian Contract Act.

<sup>2</sup> At one time the inhabitants of England found it not easy to begin a word with a hard "s". The same difficulty is met with in India today. Students of human speech are familiar with it the world over. So in England "establiish" was pronounced "establiash", "state" as "estate", "squire" as "esquire" and "stopped" as "estopped".

<sup>3</sup> As to the ostensible authority of agents, see pp. 223, 224, *ante*.

- (3) *on rent or other subject-matter of assurance in respect of or in connection with any building, shall cease immediately upon any fall or displacement,*

(a) *of such building or any part thereof,*

(b) *of the whole or any part of any range of buildings or of any structure of which such building forms part."*

"*PROVIDED that such fall or displacement is of the whole or a substantial or important part of such building or impairs the usefulness of such building or any part thereof or leaves such building or any part thereof or any property contained therein subject to increased risk of fire or is otherwise material."*

"*AND PROVIDED that such fall or displacement is not caused by fire, loss or damage which is covered by this Policy or would be covered if such building, range of buildings or structure were assured under this Policy."*

"*In any action, suit or other proceedings, the burden of proving that any fall or displacement is caused by fire as aforesaid shall be upon the Assured."*

It will be noticed that in some sense the subject-matter of this clause derives from the doctrine of Alteration. In other words, the clause singles out a special kind of event as necessarily producing a condition of things wholly different from that which was originally in the mind of the insurer when he accepted the risk.

The reader should note that this clause places upon the assured the *onus* of proof in a certain set of circumstances. This is the first of some five examples, all within these standard conditions, where the *onus* of establishing a certain set of facts, taking the event out of the exception, is placed on the assured. These provisions as to *onus* are collectively considered below.<sup>1</sup>

### (iii) *Alteration.*

As above remarked, most modern policies have a standard condition designed to exempt an insurer from liability where the risk has been palpably altered. The exigencies of business, however, point towards acceptance of the altered circumstances by insurers upon a proper disclosure of those circumstances and a re-consideration of the risk. Accordingly, we find most Alteration clauses so drawn as to provide both an opportunity for waiver of the stipulation, and a provision as to what shall be conclusive evidence of waiver. Clause 8 in the policy under review is an example of an Alteration clause so drawn.

"*Under any of the following circumstances the assurance ceases to attach as regards the property affected unless the Assured, before the occurrence of any loss or damage, obtains the sanction of the [Insurer] signified by endorsement upon the Policy, by or on behalf of the [Insurer].*

(a) *If the trade or manufacture carried on be altered, or if the nature of the occupation of or other circumstances affecting the building assured or containing the assured property be changed in such a way as to increase the risk of loss or damage by fire.*

(b) *If the building assured or containing the assured property become unoccupied and so remain for a period of more than 30 days.*

(c) *If property assured be removed to any building or place other than that in which it is herein stated to be assured.*

<sup>1</sup> See p. 284, *post*.

(d) *If the interest in the property assured pass from the Assured otherwise than by will or operation of law."*

On contest, it will always be a question of fact whether or not the changed circumstances relied upon under sub-clause (a) so operate as to "increase the risk of loss or damage by fire".

A discussion of the principles of which this clause seeks to take advantage, will be found in section 9 of this chapter.<sup>1</sup>

**Theft, Inherent Vice, Compulsory Destruction, Subterranean Fire.**—In the clause under examination (which is numbered 5) several exceptions, covering remarkably dissimilar topics, are lumped together. The clause is thus worded:

*"This assurance does not cover—*

- (a) *Loss by theft during or after the occurrence of a fire.*
- (b) *Loss or damage to property occasioned by its own fermentation, natural heating or spontaneous combustion (except as may be provided in accordance with Condition 7 (f)) or by its undergoing any heating or drying process.*
- (c) *Loss or damage occasioned by or through or in consequence of*
  - (1) *The burning of property by order of any public authority.*
  - (2) *Subterranean Fire."*

**Theft.**—A long chain of cases in England and the Dominions, from *Thompson v. Montreal Insurance Co.*, [1848] 6 U.C.Q.B. 319—in particular *McGibbon v. Queen Insurance Co.*, [1866] 10 L.C.J. 227; *Harris v. London and Lancashire Fire Insurance Co.*, [1866] 10 L.C.J. 269; *McPherson v. Guardian Insurance Co.*, [1893] Newfound. L.R. 768—to the *Knight of St. Michael*, [1898] P. 30, had treated as almost self-evident the view that the stealing of goods during a fire was something for which the insurers were liable as for a loss by fire. The clause now under discussion was designed to enable insurers to escape any such liability.

It is not a little strange that so colloquial a word as "theft" should have found a place in any clause drawn by English lawyers for English purposes; for it is no term of art in the law of England.<sup>2</sup> It happens, however, to be a term of art in the law of India. As any exception containing this word must necessarily be construed with reference to the one or the other system of law, some discussion of its import would appear necessary.

The term of art in the law of England in which is comprised what the man-in-the-street calls "stealing" was, until yesterday, larceny. And larceny is still an offence at Common Law. It was defined by the judges in *R. v. Hammon*, [1812] 2 Leach 1083, as "the felonious taking of property of another without his consent, and against his will, with intent to convert it to the use of the taker".

Today, however, "stealing" is a statutory offence by virtue of section 1 of the Larceny Act, 1916 (6 and 7 Geo. V, c. 50), which reads as follows:—

"(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries

<sup>1</sup> See p. 245, *ante*.

<sup>2</sup> Except in so far as it formerly found a place in the archaic and now obsolete "theft-bote". This was the early designation of a special offence at common law now known as "compounding of felony", as where a person robbed, not only knows the felon, but upon an agreement with him not to prosecute, obtains back the thing stolen or receives some other emends.

away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner:—

In order to understand the full scope and extent of the statutory crime thus created by the present law of England, the provisions of the two sections which follow need to be borne in mind.

Those sections are thus phrased:—

“(2)—(i) the expression ‘takes’ includes obtaining the possession—

(a) by any trick;

(b) by intimidation;

(c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained;

(d) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps;

(ii) the expression ‘carries away’ includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached;

(iii) the expression ‘owner’ includes any part owner, or person having possession or control of, or a special property in,<sup>1</sup> anything capable of being stolen;

(3) Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen:

Provided that—

(a) save as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty unless after severance he has abandoned possession thereof; and

(b) the carcase of a creature wild by nature and not reduced into possession while living shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase.”

It is to be collected from the above sections read together, that “stealing”, in the colloquial sense, is larceny; and that the obtaining possession “by any trick” or “by intimidation” of anything capable of being stolen is also larceny. Thus has the present statutory offence of “larceny by a trick” been created. This offence happens to be highly technical, and much narrower than might at first sight appear. Indeed the student may be surprised to find that the obtaining possession of something capable of being stolen by means of “a false pretence” is not “larceny by a trick”, but is yet another special crime with which the same statute deals in section 32 thereof, which reads as follows:—

“Every person who by any false pretence (1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable

<sup>1</sup> A pawnee, in the law of England and of India, is said to have “a special property” in the thing pawned, though the ownership thereof continues in the pawnor.

security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; or (2) with intent to defraud or injure any other person, fraudulently causes or induces any other person (a) to execute, make, accept, endorse, or destroy the whole or any part of any valuable security; or (b) to write, impress, or affix his name or the name of any other person, or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with, as a valuable security; shall be guilty of a misdemeanour. . . . ."

We shall touch upon the fine distinctions which English lawyers have evolved between larceny by a trick and the obtaining of money or chattels by false pretences, in our subsequent discussion of the case of *Lake v. Simmons*, decided by the House of Lords in 1927.<sup>1</sup> For the moment, it will be sufficient to point out that the word "theft", so far as any construction of this clause in terms of the law of England be concerned, is singularly unhappy, because ambiguous. As appearing in the present exception its construction must be strictly *contra proferentes*, i.e., against the interest of the insurers, as the persons hoping to escape liability thereunder. So construed it would include "stealing" whether actual (under section 1 of the Larceny Act) or constructive (under section 2). It would *not* include the obtaining possession of goods during a fire by a false pretence. For the practical purpose aimed at by our present discussion, the reader will lose little by thus postponing further discussion of the English law, since the matters to which his attention will now be directed, in order to construe the word "theft" as the same is used in the law of crime in British India, will fully illustrate the difficulties.

The law in India has avoided the English classification of crimes, as felonies or misdemeanours, by simply styling all crimes within the mischief of the Penal Code "offences".<sup>2</sup>

The "offence" of theft under the Indian Penal Code,<sup>3</sup> is much narrower than the crime of larceny either at Common Law or under the present English Larceny Act. The relative definition in the Indian Penal Code is in section 378, which reads as follows:—

"378. Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

*Explanation 1.*—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

*Explanation 2.*—A moving effected by the same act which effects the severance may be a theft.

*Explanation 3.*—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

<sup>1</sup> As to which see pp. 262, *et seq.*, *post*.

<sup>2</sup> Meaning that which is opposed to such domestic legislation as aims at the preservation of the King's peace. The word "offence" comes to us from the Latin, and literally means something which "strikes against". The old indictments in England for crimes which were the creatures of statute, contained the allegation that the thing charged was something "*against* the Form of the Statute in that case made and provided and *against* the Peace of our Lord the King his Crown and Dignity". (The italics are the author's.)

<sup>3</sup> Act XLV of 1860.

*Explanation 4.*—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

*Explanation 5.*—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession or by any person having for that purpose authority either express or implied."

It is to be collected from the foregoing definition that the necessary ingredients of the offence of "theft" under the law of India are (a) movement by the thief, (b) of moveable property, (c) out of someone's possession, (d) without that person's consent, (e) with the dishonest intention of taking that property and (f) the movement of it being in pursuance of that dishonest intention.

It is now to be noticed that, according to section 390 of the Indian Penal Code, theft is styled "robbery", where "in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint". It will be at once apparent that the word "theft", in the law of India, is a crime of a highly technical and of a more restricted nature, when compared with a law of "stealing" as the same obtains in England today. There is no room here for larceny by a trick; and, as certainly, no room within the definition for anything in the nature of obtaining money or chattels by false pretences.

We may now ask ourselves, what would be the position in England and in India so far as the present Exception goes where, a building being found on fire by its owner, occupier, or custodian, some menial were to offer to remove any of the moveables covered by a policy of insurance to a place of safety, and, on the owner, occupier or custodian consenting, the menial makes away with them and converts them or their proceeds by sale to his own use? It is submitted that in England this would be larceny by a trick, and so a constructive "stealing", and would accordingly be covered by the present Exception. But the position, it is submitted, would be otherwise in British India. For there, on the facts posed, there would have been consent on the part of the owner, occupier, or custodian to the removal of the goods by the person who offered himself for that purpose, and the offence committed would not be "theft" as defined by section 378, but the equally technical offence of "cheating", and therefore the Exception would not apply.

We may next consider the case of a servant or any other person placed in possession of moveable property covered by a fire policy with instructions to save it, and who, taking it upon such instructions during an outbreak of fire, deliberately makes away with it and converts it to his own use. Here, again, the offence would not be "theft" under the law of India, but the special crime of "criminal breach of trust", and the Exception would not apply.

Lastly let us suppose the following to be the state of facts. A stranger enters a building which is on fire and says to the owner or custodian of valuables which happen to be the subject-matter of a fire policy, "Give me these at once, and don't you try to follow me, or I will tell the police and the insurance company that I have seen you setting fire to the building!" The person so intimidated then hands over the property; and the criminal escapes. Assuming these facts to have been proved,

the crime if committed in England would be Larceny by Intimidation, and so a constructive "stealing" within section 2 of the Larceny Act, 1916, and the Exception would apply. But in India, it is submitted it would be wholly outside the definition of "theft". It would constitute the special offence of "Extortion" as defined in section 383 of the Indian Penal Code, and which is punishable under section 384 of the same; and thus the loss of the valuables would be outside the Exception.

**Inherent Vice.**—Sub-clause (b) in the Exception we are considering does not purport to cover all that is embraced by the notion of inherent vice.<sup>1</sup> It is merely concerned to avoid damage from certain circumstances in which a rise of temperature is one of the special features. The allusion to Condition 7 (f) suggests that the assured would find in the clause and sub-clause thus attracted an "exception to an exception". But in the particular policy under examination any such supposition would prove to be illusory; for the condition attracted reads "*unless otherwise expressly stated in the policy, this assurance does not cover . . . (f) coal, against loss or damage occasioned by its own spontaneous combustion*". The latter clause would thus seem redundant and the reference to it misleading.

**Subterranean Fire.**—What is here alluded to is, of course, such a fire as occasionally breaks out in colliery areas within the underground workings, which often occasions subsidences and, not infrequently, surface fires as well. It is conceived, however, that an outbreak of fire in a railway tunnel might, by means of a high wind blowing along it, set fire to premises adjacent to one or other of its termini, and in such a case it is submitted that the Exception would apply.<sup>2</sup> It might, however, be otherwise if a fire, originating in such a tunnel, were to ignite a train which in its turn, and after proceeding to the nearest railway station, were to cause an outbreak of fire on the station premises, or to goods stored thereon, whether the same were in sheds or in standing wagons. For, in the latter case, the chain of causation by strictly "natural" means would have been broken by the intervention of deliberate movement on the part of those in charge of the train, whereby the fire, independently of nature, would have been transported from the tunnel to the railway station.

The principles to be applied in regard to "spreading" fires have already been to some extent adumbrated earlier in the present chapter.<sup>3</sup> For a careful study of the rules to be applied, so as to be within the maxim *in jure proxima non remota causa spectatur*, the reader is referred to the standard treatises on fire insurance.<sup>4</sup>

Broadly stated the rules may be thus phrased: A fire which is transmitted from one place to another by a train of circumstances naturally (as distinguished from artificially) brought about, remains the originating cause of the consequent conflagrations. It is otherwise where there is a break in the chain of causation, by the intervention of some artificial stimulus, or by an event itself wholly disconnected with the original fire. It is a question of fact, in each case, whether the circumstances, read as a whole, fall within the first or the second of the above rules.

<sup>1</sup> As to which, and the cognate phrase "latent defect", see Chapter IV, pp. 111, 160, 181, 182, *ante*.

<sup>2</sup> The author makes this submission, though, truly, it might be argued that a fire spreading horizontally along a railway track is not a *subterranean fire* with respect to premises themselves above ground and in the same plane.

<sup>3</sup> See pp. 219, 220, *ante*.

<sup>4</sup> For example, Welford & Otter-Barry, 3rd Ed., p. 67.

**Events in the nature of "acts of God" and various forms of vis major.**—The clause now to be made the subject of comment, and which stands as No. 6 in the policy under review, covers a wide range of circumstances which experience has shown to be remarkably productive of loss or damage by fire. It may here be stated that for insurers specially to exempt themselves from risks thus occasioned does not import that they habitually refuse to entertain such risks, but rather represents an insistence upon the bounds of their liability under the particular instrument. In practice, modern insurers hold themselves out as willing to cover anything. But they wisely insist upon an appropriate instrument, as well as an appropriate premium, to cover risks of the graver sort against which that ordinary care and caution which is to be expected of an assured in dealing with his own property could avail nothing. The clause reads:—

*"This assurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely, occasioned by or contributed to by any of the following occurrences, or which, either in origin or extent directly or indirectly, proximately or remotely, arises out of or in connection with any of such occurrences, namely:—*

- (1) *Earthquake, volcanic eruption, typhoon, hurricane, tornado, cyclone, or other convulsion of nature or atmospheric disturbance.*
- (2) *War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), mutiny, riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military, naval or usurped power, martial law or state of siege, or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.*

*Any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise), directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this assurance, except to the extent that the Assured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.*

*In any action, suit or other proceeding, where the [Insurer] alleges that by reason of the provisions of this condition any loss or damage is not covered by this assurance the burden of proving that such loss or damage is covered shall be upon the Assured."*

It is thought that the circumstances stated under sub-clause (1) above speak for themselves. The words "typhoon", "tornado" and "cyclone" are, in reality, more or less local expressions for wind storms of hurricane force but which have the characteristic of changing their direction, and whose path on the horizontal plane is circular, or, if considered in three dimensional space, describes a spiral.

**War, etc.**—To describe what amounts to a "state of war" may at first sight appear none too easy, in view of modern developments. Older authorities on International Law tended to lay down a number of hard-and-fast rules by which the matter was to be judged: the burden of their opinions, broadly stated, being that apart from the actualities of conflict, there were formalities to be observed, or at least the rupture of

pre-existing formal relations, before one could hold, *ex cathedra*,<sup>1</sup> that a "state of war" had arisen. One attempt at describing the essential features of a state of war has, however, twice found favour with the Courts in England. "When differences between states reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant."<sup>2</sup> In a recent case (*Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S. S. Company, Ltd.*, [1938] 54 T.L.R. 901; All E.R. 80), a charterparty contained a clause giving liberty to the charterers and owners to cancel the charterparty "if war breaks out, involving Japan". The question to be determined was whether in fact "war" had broken out, involving Japan, on or before the 18th of September, 1937, when the owners had purported to cancel the charterparty under and by virtue of this clause. The umpire in certain arbitration proceedings had found in favour of the contention that "war" had broken out within the meaning of the clause. Goddard, J., in upholding the award, invoked the principle enunciated by Pickford, J., in *Republic of Bolivia v. Indemnity etc. Co.*, [1909] 1 K.B. 785, namely, that in a document used by business-men for business purposes, the language used must be given the meaning which would be given to it by ordinary persons, rather than the meaning to which it might be extended by writers on International Law. He thought that parties did not intend to become involved in the nice distinctions drawn by writers on International Law (writing long ago, when conditions were different) between reprisals, intervention, peaceful blockade, peaceful penetration, and war. He thought that the parties intended the word "war" in this clause to have the meaning which ordinary commercial men, or, say, the captain of a tramp steamer, would give to it. They meant that, if an armed conflict broke out between Japan and some other nation, that would justify putting an end to the charter.

**Riot, etc.**—The words "riot" and "civil commotion" have been the subject of observation in the preceding chapter of this treatise.<sup>3</sup>

It is, however, always the border-line case which gives trouble. The disturbances in Ireland immediately after the European war of 1914–1918 provided many such cases, from one of which the judgment of Roche, J., well illustrates how what may begin as a civil commotion may attain quite different proportions, and assume quite another meaning. "I am satisfied that Easter week in Dublin was a week not of mere riot, but of civil strife amounting to warfare waged between military and usurped powers and involving bombardment." (*Curtis and Sons v. Mathews*, [1918] 2 K.B. 825, 828, 829.)

The words "insurrection" and "rebellion" connote scarcely distinguishable ideas. Both have more or less the meaning of the French word "*révolte*", and are narrower than the word "revolution",<sup>4</sup> which, indeed,

<sup>1</sup> Meaning, "from the chair"; in this instance, the professorial chair.

<sup>2</sup> Hall's International Law, 4th Ed., p. 63, approved by Mathew, J., in *Driefontein Consolidated Gold Mines v. Janson*, [1900] 2 Q.B. 339, 343; and by Goddard, J., in *Kawasaki Kisen, etc. v. Bantham S. S. Co.* (*supra*).

<sup>3</sup> See pp. 170, 171, *ante*.

<sup>4</sup> " 'Mais' said poor Louis, 'c'est une révolte, why, that is a revolt'. 'Sire,' answered Liancourt, 'it is not a revolt,—it is a revolution.'" Carlyle, *The French Revolution*, Ch. VII.

has come to mean such a social or political upheaval as brings the form of the pre-existing government to an end.

In this context, the word "conspiracy" cannot point to the well-known misdemeanour at Common Law of which all are guilty who agree together to commit a crime, and where it is immaterial whether the crime be in fact committed or not (*R. v. Whitchurch*, [1890] 24 Q.B.D. 420), but must, it is submitted, rather relate to a confederation which has for its object the overthrow of the government or of some lawful authority created by government: in two words, to a *treasonable* conspiracy.<sup>1</sup> In a similar context the word "conspiracy" is coupled with the word "rebellion" in an old Litany<sup>2</sup> still in use in the Church of England, wherein prayer is offered for deliverance from "privy conspiracy and rebellion".

There remains to offer some commentary on the exceptions which relate to "mutiny", "martial law" and to a "state of siege".

**Mutiny.**—"Mutiny" seems hardly to have attained to the dignity of a term of art.<sup>3</sup> Its derivation is by no means clear, and its use in England appears no earlier than the 16th century. In the official Manual of Military Law, the word "mutiny", as used in the Mutiny Acts, in the Annual Army Act (which took their place) and in the Articles of War, is said to imply "collective insubordination, or a combination of two or more persons to resist or to induce others to resist lawful military authority". The foregoing suggested definition has been incorporated into the Manual of Indian Military Law, and has been adopted, *totidem verbis*, by Sir Hari Singh Gour in his commentary on Chapter VII of the Indian Penal Code, which deals with offences relating to the Army and Navy.<sup>4</sup> The words "military authority" are wide enough to include all naval ranks and ratings, as also the authority of the Admiralty and all other authorities towards whom obedience is enjoined by the Articles of War. Similar provisions to those found in the Army Act and the Articles of War have now been made for the Royal Air Force. There is also an Indian Army Act and an Auxiliary Force Act, which apply to those armed forces of the Crown which are raised in India.

The word "mutiny", as commonly used, would seem to apply to conduct of a like character if and when pursued by the subordinate ranks of a Police Force against the higher command of that force; or by the warders of a prison against the jailor, constable, superintendent or governor thereof; as also of the convicts themselves when combining to resist the authority of those who have charge of them. It is used of collective insubordination in the merchant service.

**Martial Law.**—Around the expression "Martial Law" as used by writers upon English constitutional history, there has grown up much controversy. In consequence of this state of things it may often be a matter of some difficulty to determine whether, for the purpose of the Exception, and in a given state of circumstances, martial law may or may not properly be said to prevail.

<sup>1</sup> A criminal conspiracy is defined in sec. 120A of the Indian Penal Code. Treasonable conspiracy (a phrase not used in the code) is punishable under sec. 121A thereof.

<sup>2</sup> A public formal prayer in which each subject-matter is stated by the priest and the supplication made by the people.

<sup>3</sup> The word "mutiny" appears in the Army Act, and the corresponding statutes relating to the discipline of other Armed Forces of the Crown, but is nowhere defined in those enactments. It figures, too, in the Indian Penal Code which, by sec. 135, makes the *abetment* of mutiny an offence punishable by imprisonment up to 10 years. But the code nowhere provides a definition of the word.

<sup>4</sup> 3rd Ed., Art. 1209, p. 737.

A definition of martial law upon which English judicial opinion is agreed has not yet emerged. The complaint of those who signed the celebrated Petition of Rights upon which so much of the liberties of the citizens of England is said to depend, expressly referred to "Martial Law" as being misused and applied to those subjects of the King who were not amenable to it; while others were let go upon pretence that they could only be dealt with under martial law; and that, in so acting the military commissioners were doing violence to the laws and statutes of the realm. It is said that since the Petition of Rights, martial law, in the strict sense of the words, cannot be applied in England without violence to the constitution. It is otherwise in a state of war. In the British Dependencies, martial law is usually made the subject of a special Proclamation; but it is doubtful if the right of the military to establish military courts and otherwise to assume all the executive governmental functions which the Commander may think necessary depends, in any way, upon the Proclamation, which, properly speaking, does but give notice of a *de facto* condition of things which the military authorities have determined to set in being. The better opinion would seem to be that in the law of England the *de facto* assumption of military power confers no right *de jure*, without an act of Parliament to support it. In cases where the assumption of such power is grounded upon an alleged grave necessity, the situation is met by the subsequent passage through the legislatures of one or more special statutes expressly styled Acts of Indemnity.

On the other hand it must be remembered that in contemplation of the law of England, a soldier or other lawfully enlisted or commissioned man-at-arms is no more than an armed citizen. As Lord Haldane put it, "The soldier is different from an ordinary citizen only in this, that he is armed with a deadly weapon<sup>1</sup> and he comes out in military formation . . . . We (i.e., the army council) are in control of a number of people who are citizens as well as soldiers, and if they are requisitioned to assist the Civil Authorities, then, if it be necessary they should assist and if they are required and cannot be done without, they will have to go."<sup>2</sup>

In the theory which informs the foregoing observations of Lord Haldane, the military, when going to the aid of the civil power even to the extent of applying its own special sanctions, namely, by force of arms, only exemplifies in a manner unusual today, the right which everyone may exercise at Common Law, not only to protect his own life and property, but the life and property of others. That same right is, in India, conferred by the Indian Penal Code. But when the military are thus called upon to aid the civil power, there is in reality no usurpation of that power. Consequently, the mere taking over of the administration of some area by the military does not *ipso facto* permit of rule by martial law nor is it an example of such rule. For martial law presupposes a complete abdication or deposition of the civil administration. Thus, in such a situation, where the civil power no longer exists, military courts must take the place of the ordinary courts, and martial law must take the place of the ordinary law of the land. This is the view which was enunciated by the Supreme Court of the United States in *ex parte Milligan*, [1866] 4 Wallace U.S. Rep. 2, 137.

<sup>1</sup> Till the beginning of the 19th century in Europe all noblemen and gentlemen not only had the right to bear arms, but habitually appeared in the public streets sworded. Society was divided into those who had and those who had not this right. Every nobleman and gentleman was really an amateur soldier.

<sup>2</sup> Parliamentary Paper, 1908, N.O. 236.

The law relating to the use of military forces in aid of the civil power in India is embodied in sections 128 to 132 of the Code of Criminal Procedure (Act V of 1898).

It is submitted that martial law, for the purposes of this Exception, should be construed strictly *contra proferentes*,<sup>1</sup> and that it would, therefore, not apply to a situation where the civil power was not deposed, but was merely making use of the military in aid of its own duties to preserve law and order.

**State of Siege.**—The expression “state of siege” is derived from continental law, and, for the purposes of this Exception, may be regarded as the equivalent of martial law as the same is understood in England. That law knows nothing of a state of siege; and the state of siege has no place in the law of India.

(iv) *Miscellaneous Goods and Chattels.*

The 7th condition imports a number of other Exceptions into the policy. It enumerates six classes of goods and chattels<sup>2</sup> as not covered by the policy, and then follow two Exceptions in gross, and of a different order. The clause reads as follows:—

“Unless otherwise expressly stated in the Policy this assurance does not cover—

- (a) Goods held in trust or on commission.
- (b) Bullion or unset precious stones.
- (c) Any curiosity or work of art for an amount exceeding £20.
- (d) Manuscripts, plans, drawings, or designs, patterns, models or moulds.
- (e) Securities, obligations, or documents of any kind, stamps, coined or paper money, cheques, books of account or other business books.
- (f) Coal, against loss or damage occasioned by its own spontaneous combustion.
- (g) Explosives.
- (h) Any loss or damage occasioned by or through or in consequence of explosion; but loss or damage by explosion of gas used for illuminating or domestic purposes in a building in which gas is not generated and which does not form part of any gas works, will be deemed to be loss by fire within the meaning of this Policy.

<sup>1</sup> Against the persons “proffering”, i.e., putting forward, the exception (for the purpose of escaping liability).

<sup>2</sup> In the law of England property is ordinarily divided into “real” and “personal”. “Goods” belong to the latter category. “Chattels” may be personal property, or may be so closely connected or associated with land, as, in the words of old-time lawyers, to “savour” of it, when they are styled chattels “real”; all other chattels being regarded as chattels “personal”. Originally “goods” and “chattels” (*bona et catalla*), though commonly coupled together in one phrase, meant one and the same thing. But in course of time certain species of property might rightly be classed as “chattels”, which would not normally be referred to as “goods”, and vice versa. In the above list money in coin is not to be classed as chattels, but in certain circumstances might be goods. Securities and obligations, on the other hand, are not, properly speaking, goods, but may justifiably be styled chattels. Coal in most circumstances would be goods, and in others might be chattels real. The word chattel has no place in the law of India relating to property, which in that law is divided simply into moveables and immoveables. These latter words, as well as the division itself, are English. But it is not English to speak of “a moveable”. The word “chattel” is therefore a useful word, for which the law of India has as yet provided no substitute.

- (i) *Any loss or damage occasioned by or through or in consequence of the burning, whether accidental or otherwise, of forests, bush, prairie, pampas or jungle, and the clearing of lands by fire."*

**Goods.**—The reader will need some guidance as to the meaning to be attached to the first Exception figuring in the clause under review: "Goods held in trust or on commission". The word "Goods" (except perhaps in a policy covering wholesale or retail stock-in-trade) here means more than merchantable articles in the commercial sense. It is first to be observed of the next two words "in trust" that the same do not import goods necessarily the subject of an express or implied trust in the technical sense; e.g., a person in possession of goods need not necessarily be a trustee in that sense. (*Waters v. Monarch Fire etc. Assurance Co.*, [1856] 5 E. & B. 870, 880; *South Australian Insurance v. Randall*, [1869] 3 P.C. 101, 107; *Lake v. Simmons*, [1927] A.C. 489.) On the contrary, what are sought to be excepted are goods in the possession of anyone who is not the owner of them, and whose possession is therefore, in contemplation of law, that of a bailee: whether gratuitously or for reward is immaterial. (*London & N.W.Rly. v. Glyn*, [1859] 1 E. & E. 652; *Genn v. Winkel*, [1912] 107 L.T. 434.) The last-named case is an authority for the further proposition that the Exception will extend to goods of which the assured has custody, though he himself may have parted with the charge or care of them to someone else.

The Exception, it will be noted, extends to goods "on commission". It is well-settled that in this context the phrase is to be construed as referring to goods placed in the hands of someone for the purposes of sale. But so used, the word "commission" means no more than that the person in possession of the goods has had them "committed" to him for that purpose. Thus, to bring the goods within the Exception, it is not necessary that the terms of such a commission should include a reward for the services so rendered<sup>1</sup>. (*Waters v. Monarch Fire etc. (supra)*; *North British & Mercantile Insurance Co. v. Moffatt*, [1871] 7 C.P. 25.)

"In trust".—It is here that a discussion of what was decided by the House of Lords in *Lake v. Simmons (supra)*, would appear useful. In that case, the policy sued upon was a Lloyd's policy, providing insurance against fire, burglary, robbery, theft and accident; the period covered being 26th December, 1922, to 25th December, 1923, and the property at risk being the stock-in-trade, "*The property of [the plaintiffs] their own, in trust or on commission, or for which the assured are held to be responsible while in their own custody, or in the custody of any person or persons to whom they may have entrusted the same, on the condition of sale or return, for valuation or inspection, or for any other purpose whatsoever.*"

The policy contained certain Exceptions of which the first read:—

"(1) *Loss by theft or dishonesty committed by any servant or traveller or messenger in exclusive employment of the assured (except when conveying goods to the post) or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured, their servants or agents, unless such loss arise when the goods are deposited for safe custody by the assured, their servants or agents with such broker or customer or broker's customer.*"

The matter in controversy involved the proper construction to be put upon the following words appearing in the above Exception, namely,

<sup>1</sup> That is, by payment of money commercially styled a "commission".

"loss by theft or dishonesty committed by any customer.....in respect of goods entrusted to [her] by the assured".

The material facts were as follows. A woman, E., obtained the confidence of the plaintiff by making a number of purchases for which she paid by cheques. Her cheques were duly honoured. She had casually represented herself as the wife of one B. Some weeks later she visited the plaintiff's premises again and asked to see certain necklaces. To show her what she wanted to see, the plaintiff obtained two necklaces on trade terms from another retail jeweller, and in these she appeared to be interested. On the pretext that *her husband and a family friend, referred to as Commander D.,* would like to see these necklaces with a view to buying one or both of them, she induced the plaintiff, who believed her representations, to allow her to take them away. The transaction was entered by the plaintiff in his books as goods sent to B. and to Commander D. "on appro". The plaintiff never saw the goods again. Nor, for the matter of that, did he again see the woman till she had been arrested and brought to trial. It then transpired that she was the mistress and not the wife of B.; while, as for Commander D., he had no existence in fact. Eventually E. was convicted of "larceny by a trick", and sentenced accordingly. It then became a matter of controversy between the plaintiff and his insurers as to whether the event which thus occasioned his loss was covered by the above-quoted Exception in the policy.

For the insurers it was contended that the woman was, at the material time, a customer within the meaning of the relative Exception and that, as contemplated by the same, there had been on the part of the assured an "entrustment" of those goods to that "customer". For the plaintiff, on the other hand, it was argued that E. was not a customer for the purposes of the Exception; and that, since she had obtained the goods by deceit, there could be no entrustment on his part; and he claimed a proper indemnity from his insurers accordingly.

In the Court of first instance McCardie, J. (see [1926] 1 K.B. 366), construed the Exception as applying "to a customer *qua* customer, and for the purposes of that customer as such, with respect, for example, to the purchase by that customer of goods delivered on sale or return to him or her. A customer may be a customer with respect to one transaction and a mere agent or messenger or carrier with respect to another proposed transaction". The Court held E. to have received the goods "as a mere agent or messenger for the purpose of showing them to others who might or might not become customers".

Upon the question of "entrustment" the learned Judge had the duty of approaching the question regardless of the woman's conviction for a specific criminal offence. But this did not relieve him from the necessity of examining the principles of the law relating to larceny under the Act of 1916, for the purpose of seeing whether it threw any light upon the matters in controversy between the parties. Citing, amongst others, the *dictum* of Fletcher Moulton, L.J., in *Oppenheimer v. Frazer*, [1907] 2 K.B. 50, 72, to the effect that "the law recognizes a form of larceny in which the apparent delivery of the possession of goods by the owner of them, which has been obtained by a trick *animo furandi*,<sup>1</sup> does not in law import consent to that possession, so that the person who obtained that possession may be treated as having 'taken' the goods without the owner's consent"; and a passage from the judgment of Coleridge, C.J., in *Reg. v. Russell*, [1892] 2 Q.B. 312, 314, wherein it was held that

<sup>1</sup> "With the mind of a thief."

"if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete and the parting with the possession has been obtained by fraud—that is larceny"; the Court held that there was no consent on the part of the plaintiff to any transfer of possession from himself to the woman E., and consequently no entrustment. Accordingly the defence failed and judgment was given for the plaintiff for £1,450 and costs.

The insurers appealed ([1926] 2 K.B. 51) and obtained a reversal of the judgment of McCardie, J., by a majority, Atkin, L.J., being of opinion that McCardie, J., was right upon both the questions raised. The last-named Lord Justice regarded the words of the clause as in some degree lacking in precision though not ambiguous. On any construction he regarded the words as plainly "not including all larceny by a customer; for if the customer were secretly to purloin jewellery from the counter, the theft would not be within the Exception".

From the foregoing judgment the plaintiff appealed to the House of Lords ([1927] A.C. 487); where the judgment of the Court of Appeal was unanimously reversed and that of McCardie, J., restored with costs there and below.<sup>1</sup> The *ratio decidendi* was that consent to a transference of possession of the thing entrusted was an essential ingredient of such an entrustment as was contemplated by the Exception. In the course of his advice tendered to the House in this case, Viscount Sumner observed as follows.—

"Every one must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure. This, however, is not a case in which the appellants propose to read the policy as if they were arguing an old-fashioned indictment, nor do I think it fair to discuss their contention as if it involved 'technicalities of the criminal law'. Even if it were the case that the occasion, on which the doctrine of larceny by a trick at common law was first developed, was one in which a thief would otherwise have escaped conviction, where he had called in fraud to the assistance of his nimble fingers, the doctrine is now statutory under the Larceny Act, but I do not think the doctrine ever was one, which could be described as being an artificial view of the facts as opposed to the actual facts of the case. It was not merely 'invented by judges' to prevent a thief from taking advantage of his own wrong and relying upon a possession which he obtained unlawfully. Before this 'invention' an accused person, who contended that there was no sufficient evidence of a 'taking', was not relying on a possession unlawfully obtained; he was relying on the law and was taking proper advantage—if that is the word—of being in the right at any rate as to the law of evidence. I dissent from the view that criminal law should be treated as irrelevant merely because a document is commercial. After all, criminal law is still law and so are its definitions and rules. Besides, the distinction between a real consent, obtained by deceit, and an unreal consent, extracted by a trick, is equally applicable to civil disputes. As Mr. Justice Story says (Equity Jurisprudence, § 222): 'consent is an act of reason accompanied with deliberation . . .'. Grotius has added that what is not done with a deliberate mind does not come

<sup>1</sup> The effect of this judgment is unaccountably misstated in Porter's *Laws of Insurance*, 8th Ed. (1933), at p. 64, where it is said "therefore, the insurers were not liable".

under the class of perfect obligation, and hence it is true, if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind."

As in the case of the word "theft", so in the case of the expression "in trust", it becomes necessary to see how far, if at all, the rights of the parties in the matter of such an Exception as we are now considering are affected by the law applicable to the question in India. As already pointed out earlier in this chapter<sup>1</sup> the law of India clearly distinguishes between theft and other forms of dishonest conduct whereby the property of one person finds its way into the possession of another and by that other is converted to his own use. A recent decision of a High Court in India has, it is submitted, arrived at a correct conclusion as to what constitutes an "entrustment", at any rate, in the law of crime in British India. In this case (*Emperor v. John McIver*, [1936] 37 Cr. L.J. 637) a majority of a Bench of the Madras High Court<sup>2</sup> held that what amounted to "Larceny by a trick" in England was, under the Indian Penal Code, the offence of Cheating,—an offence defined in section 405, and complete the moment the object which the cheat had in view was achieved, *i.e.*, when he had gained possession of the money or the thing wanted. Following the views expressed in *Lake v. Simmons* (p. 262, *ante*), which were considered and cited by the Bench, the Court held that whatever was subsequently done with the money or the thing thus obtained, there was no room for the notion of criminal breach of trust, because where possession had apparently been parted with, but, owing to the deception practised, the *consensus* of the owner or custodian to a parting of possession had not accompanied the mere physical transfer, there could be no entrustment. It is submitted that where, as in the Exception under discussion, it is no technical trust in the strict sense to which the parties mean to limit this Exception—though, truly, a technical trust would of necessity be included—the doctrine so laid down by the Madras High Court enunciates a principle which is as applicable to the law of commercial contracts as to that of crime. If this view of the matter be sound, such an Exception as the one we are considering will not serve to relieve insurers from liability either under the law of England or of India, where an assured has been the victim of such a deception as to part with the physical, as distinct from the legal, possession of property covered by a policy of insurance.

**Explosion.**—The subject-matter under heads (h) and (i) in this clause may need a short commentary. Clauses framed to except risks consequent upon explosion have given a certain amount of difficulty. The clause would not be necessary at all if it sought merely to avoid liability for loss by an explosion as such, for an event of that character is not within the contract. (*Re Hooley Hill Rubber & Chemical Co. and Royal Insurance Co.*, [1920] 1 K.B. 257, 273, C.A.) So, too, the clause is irrelevant where an explosion is wholly disconnected from the fire. So much is obvious. The same case is an authority for the proposition that the cause of the explosion is immaterial, since the Exception covers all such happenings as occur while the fire is raging. And where the explosion is itself the predisposing influence, and thus occasions the fire, the consequent loss and damage are palpably within the Exception.

<sup>1</sup> See pp. 254 *et seq.*, *ante*.

<sup>2</sup> Cornish and Mockett, J.J. (Lakshman Rao, J., dissenting).

(*Curtis's and Harvey (Canada) Ltd. v. North British & Mercantile Insurance Co.*, [1921] A.C. 303, P.C.) Lastly it should be noted that where destruction by explosive materials is resorted to for the purpose of fighting the fire, the Exception has no application. (*Stanley v. Western Insurance Co.*, [1868] 3 Ex. 71, 74; *Re Etherington Lancashire & Yorkshire Insurance Co.*, [1909] 1 K.B. 591, 599.)

**Forest, etc., fires.**—The Exceptions enumerated under item (i) of the clause are designed to protect the insurer under this particular instrument from the results of any fire which does not originate from the premises described in the policy. In many of the British Dominions fires originating in a forest or upon prairie land often lead to the complete destruction of business or domestic premises, which the flames surround with astonishing rapidity. Of recent years the system of clearing lands by burning has proved particularly dangerous as a predisposing influence to the destruction of house property or farm buildings. The practice is common in certain parts of India.

**Effect of Marine Policy.**—Provision is made for overlapping of a fire policy and a marine policy which includes fire as one of the risks covered. In the policy commented upon, this Exception stands as the 9th condition and it reads as follows:—

*"This assurance does not cover any loss or damage to property which, at the time of the happening of such loss or damage, is assured by or would, but for the existence of this Policy, be assured by any Marine Policy or Policies except in respect of any excess beyond the amount which would have been payable under the Marine Policy or Policies had this assurance not been effected."*

For principles by which a policy in the form of a marine policy is to be construed when it purports to include fire amongst the perils insured against, the reader is referred to the observations offered in the previous chapter of this treatise.<sup>1</sup> The clause set out above in some measure fixes the insurer's contribution to the total indemnity which may be claimed by virtue of all the marine and fire policies which the assured may have taken out.

#### (v) Avoidance on special grounds.

**Misdescription, Misrepresentation, Non-disclosure and Fraud.**—In the form under examination these topics are included in what is dealt with under conditions 1 and 13. These read as follows:—

*"1. If there be any material misdescription of any of the property hereby assured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the [Insurer] shall not be liable upon this Policy so far as it relates to property affected by any such misdescription, misrepresentation or omission."*

*"13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Assured or any one acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Assured, or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th*

<sup>1</sup> See p. 155, ante.

*condition of this Policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited."*

The topics of misdescription, misrepresentation and fraud have, it is thought, been as fully dealt with earlier in this treatise as is consistent with the scale of the work.<sup>1</sup> Thus the first of the conditions above set out needs, it is hoped, but little further comment. A recent case in England illustrates, however, the lengths to which insurers may be advised to go in the direction of repudiating policies (not to mention claims thereunder) upon the ground of non-disclosure and fraud. The case (*Ewer v. National Employers' Mutual General Insurance Association*, [1937] 2 All E.R. 193) was a peculiar one in many respects: not the least interesting feature being one of practice. The material facts were that the plaintiff was the proprietor of a number of charabancs and lorries, and carried on his business at a certain garage of which at the material date he was the proprietor. From 1920 to 1928 he carried on his business in partnership with his father-in-law, S. In strictness, though the partnership was dissolved in 1928, the garage premises remained the joint property of the plaintiff and his father-in-law. The plaintiff insured these premises as also trade fixtures, fittings, utensils, and tools in 1930 against fire. He had made a claim in 1931 which was settled for £76. The policy which covered the whole of the aforesaid property was valued at £6,000; it was from year to year renewed, and in May 1936 a second claim was made thereunder in respect of a fire which it was not suggested was anything but accidental. On notice of the fire having been given, the insurers sent down a representative of their assessors. The plaintiff was told to forward a claim and did so. During the negotiations the insurers' solicitors wrote repudiating liability, and stating "generally the grounds on which the liability is disputed are breaches by you of conditions 1 and 5". These read as follows:—

"1. This policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular."

"5. If the claim be in any respect fraudulent . . . all benefit under this policy shall be forfeited."

The reader will note that in the conditions under examination, non-disclosure is relied upon under the words "*omission to state such fact*": the words "*such fact*" attracting the words "*any fact material to be known for estimating the risk*", appearing immediately before. The reader will also note that the first words in condition No. 13 in the policy under examination are identical with the first words of condition No. 5 in the policy sued upon.

By reason of an arbitration clause the insurers were able to demur to the claim which the plaintiff sought to establish in terms of money. The plaintiff, however, obtained leave to amend so as to ask a declaration that the series of policies of insurance "were valid and subsisting and of full force and effect". This raised the only issue which, having regard to the arbitration clause, the judge had jurisdiction to decide.

It appeared that the plaintiff had effected an earlier policy with other insurers, not upon the same subject-matter, but upon goods which

<sup>1</sup> For what constitutes misdescription, see pp. 237–242. *ante*; and for a discussion of the doctrines of misrepresentation and fraud, see Chapter II, pp. 36–38 and 41–43 respectively, *ante*.

he had been transporting as a carrier; that he had made a number of claims upon them; and that in December 1929 the Lloyd's underwriter, who had been underwriting this all-risks transit policy, had said that he did not want to go on with it. The insurers relied not only upon the non-disclosure of all the aforesaid facts concerning this other policy, but also upon the discovery of policies taken out by the plaintiff's erst-while partner, S., so far back as 1912 (a matter of 24 years before the plaintiff's renewal policy sued upon) which had not been disclosed when effecting the original policy in 1930, or even subsequently. Upon these grounds, taken together, the insurers claimed to be entitled to repudiate the policy of 1930 and every subsequent renewal of it. It is material to notice that the plaintiff had effected the original insurance through brokers who had submitted to the insurers a document which they styled "an order" for a fire policy. It gave the name of the plaintiff and his place of residence, the description of the property, and the relative sums to be insured. A surveyor had been sent to inspect the property and he had reported the proposal as a desirable risk. No *questionnaire* had been issued to the plaintiffs, either by the brokers, the insurers themselves or the surveyor.

The defence of fraud was based upon the allegation that the claim made was so exaggerated as to be fraudulent. The material facts, however, were that the plaintiff had based his claim in respect of fixtures, tools, etc., destroyed or damaged upon the current catalogue prices of all such articles when new. It was not suggested that he had put a fictitious valuation upon anything.

In a considered judgment, MacKinnon, J., characterised the contentions put forward by the insurers as "of great gravity and.... of complete novelty". In support of the contention that a proposer for a fire policy must disclose any claim he has ever had on any insurance policy, his lordship found no authority whatever. Dealing with the second contention, namely, that there should have been a disclosure of the refusal to renew quite another kind of policy with a different insurer, his lordship observed, "I was told by one of the gentlemen who was called as an expert that there is some subtle difference between what he was pleased to call a declination of a policy and its refusal. If a risk has been only 'refused', that, he says, need not be disclosed, but, if it has been 'declined', then it must be disclosed. I made strenuous efforts to try to get some explanation from him, and from the other gentleman who was called, as to what was the difference between declining and refusing a risk, and I am still in a state of complete ignorance as to what the difference is. It only adds to the gravity of the task which appears to be set before the would-be assured, that he has, first of all, to understand the difference between refusing and declining a risk, and then to bear in mind that, if the risk has been refused, he need not disclose it, and if it has been declined, he must. I think that the defendant company has failed to establish that there was any concealment of material facts by the plaintiff or his brokers." Upon the allegations of fraud, the Court held that the basis of claim was not fraudulent but amounted to no more than a bargaining figure arrived at in a perfectly open manner.

A condition similar to the second of the two now under discussion was relied upon in a recent Indian case (*Central Bank of India Ltd. v. Guardian Assurance Co. Ltd. & Anr.*, [1936] 6 Comp. Cas. 161 P.C.). There the assured had put in a claim which all the Courts invoked concurred in regarding as grossly exaggerated to the knowledge of the assured. This exaggeration, coupled with the assured's

behaviour at the time of the fire and afterwards, combined to establish a case of fraud against him. In those circumstances the claim failed.

In the first sub-clause of this condition, the expression "wilful act" would seem to stand in need of some commentary. But for judicial interpretation, it might be supposed that a fire which took its origin from something done by the assured, which he *intended* or *meant* to do, would deprive him of all benefits under the policy, even if what he intended to do was in itself innocent and no disastrous effect was foreseen by him. Happily, the expression has been held only to cover conduct on the part of the assured which he must be taken to know would, *ipso facto*, produce at least *damage* by fire, and that such damage by reason of his act was the result he intended to produce.

In general, what is aimed at is incendiarism on the part of the assured, i.e., the deliberate act of setting fire to property, or what in the particular context would have the same result, e.g., intentionally moving one's property so that it should catch fire from something else, which either is on fire or which is likely to catch fire or be set fire to.

It is immaterial that, in fact, most forms of incendiarism are crimes. In the law of England the deliberate setting fire to *another's* house is a felony at Common Law. That crime is styled "Arson". To set fire to *one's own* house was not arson at Common Law. If, however, such an act endangered the house of another, it was a high misdemeanour. The setting fire to any premises maliciously has, however, for long been a felony by statute in England. The setting fire to any of His Majesty's ships, dockyards, or arsenals, and to any ship lying in the port of London is a felony punishable with death by public execution, which penalty in respect of these particular crimes has not been abolished. In India, malicious incendiarism is the subject of special provisions enacted in the Penal Code, namely, sections 435-438. Where incendiarism on the part of an accused, or of anyone else at his instance, and with his privity, is relied upon for the purposes of the above exception, the accusation must be proved in the civil suit with the same exactitude as would be necessary for securing a conviction in a criminal court upon the same allegations.

It makes no good reading for a layman, i.e., one who is not a lawyer, to find a stipulation upon the topic of limitation included in a numbered paragraph dealing with a wholly dissimilar subject. It is suggested as wiser, because fairer, at any rate in a contract for use in India, to relegate the topic of limitation to a separately numbered condition, which might, it is thought, conveniently follow the arbitration clause, if any. At any rate, it is proposed to deal with all such stipulations in a later part of this chapter.

#### (vi) Notice.

In the policy under examination the topic of notice appears twice; first, in condition 3 which reads as follows:—

*"The Assured shall give notice to the [Insurer] of any assurance or assurances already effected, or which may subsequently be effected, covering any of the property hereby assured, and unless such notice be given and the particulars of such assurance or assurances be stated in or endorsed on this Policy by or on behalf of the [Insurer] before the occurrence of any loss or damage, all benefit under this Policy shall be forfeited."*

**Other Assurances.**—This condition speaks for itself, and yet is one of those which may easily be overlooked by a careless person. Where

anything in the nature of a *questionnaire* has been sent to the proposer and answered before the issuing of the policy, and such *questionnaire* includes a request for the information dealt with in this condition, the condition itself is not likely to lead to trouble. But where the subject-matter of this condition has not been adumbrated at all by the insurers, its dangerous nature may remain unsuspected by the assured till some claim is made and the same is sought to be avoided under its terms.

**Of Loss.**—The second condition dealing with the subject of notice figures in the policy under discussion as *condition No. 11*. It refers to the necessity of an immediate notice of the happening of any loss or damage. The condition needs careful study because included in it is a stipulation that non-compliance with its terms will disentitle the assured to payment of the relative claim. The student should note that this is the only disability under which an assured who has failed to comply with the provisions of this condition is placed. He should accordingly compare the sanction thus imposed by condition 11, with the forfeiture of "all benefits under this policy", which is the penalty exacted for a breach of condition 3. With this introduction condition 11 may be examined more closely. It reads as follows:—

*"On the happening of any loss or damage the Assured shall forthwith give notice thereof to the [Insurer] and shall within 15 days after the loss or damage, or such further time as the [Insurer] may in writing allow in that behalf, deliver to the [Insurer] :—*

*(a) a claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind,*

*(b) particulars of all other assurances, if any.*

*The Assured shall also at all times at his own expense produce, procure and give to the [Insurer] all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the [Insurer] as may be reasonably required by or on behalf of the [Insurer] together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.*

*No claim under this Policy shall be payable unless the terms of this condition have been complied with."*

Under a condition in the more usual of the standard forms the notice must be in writing. Apart from any such precise stipulation, a verbal notice, whether by the assured or by his agent, is valid. In the case of a firm, notice by any one of the partners is sufficient. (*Davies v. National Fire and Marine Insurance Co. of New Zealand*, [1891] A.C. 485, 489.) A condition prescribing a notice in writing may, like all other stipulations which are for the benefit of but one of the contracting parties, be expressly or impliedly waived by that party, as, for instance, in the matter under discussion, by the acceptance of a verbal notice. Such, at any rate, has been the view taken in several of the Dominion courts between 1885 and 1925<sup>1</sup>; and that view does but apply a well-recognised principle of law.

<sup>1</sup> See Welford & Otter-Barry, 3rd Ed., p. 269, note (i) and cases cited.

The importance of some such notice is self-evident, since, without it, the insurers might lose not only the first opportunity of determining the origin of the fire, but of intervening in any manner to which they might be entitled under their contract towards mitigating the damage. The honest holder of a policy of fire insurance in these days, and where circumstances permit, would make use of the telephone, or, if far afield, of the telegraph, and would later confirm the information thus forwarded by an appropriate letter. It is submitted that telegraphic information, if reasonably detailed and explicit, would amount to a notice in writing within such a stipulation.

But far more serious considerations arise under clause (a) of this condition. For if any claim the assured may be minded to make is eventually to rank for payment, he must comply with the obligations imposed by this clause; that is to say, he must formulate that claim in considerable detail, and must see that it reaches the insurers within 15 days, or within such extended period as the insurers themselves may expressly allow. The two-fold nature of the duty thus imposed upon him is imperative. If he assumes that he need not get his claim in punctually, i.e., within the time allowed, there may be used against him the words of Lord Shaw of Dunfermline, who expressed himself as unable to "comprehend the elasticity of punctuality" and unaware of any method of construing a contract, "by way of a contradiction of it". (*MacLaine v. Gatty*, [1931] 1 A.C. 376, 393.) As, in the Orient, time seems to move uncommonly fast and man uncommonly slow, it might be the path of wisdom, from the assured's point of view, to stipulate for at least 21, instead of 15 days, in this clause<sup>1</sup>; for it must often be a matter of no small difficulty in India to collect all the information requisite for a detailed statement of claim in so short a time.

What amounts to compliance with such a clause in this last-named particular will, naturally, in large measure depend upon a proper construction (in the sense of interpretation) of the clause itself.

As to waiving the time factor, the student must note that the mere absence of any objection to a claim sent in late will not operate as a waiver of the condition. (*Whyte v. Western Assurance Co.*, [1875] 22 L.C.J. 215 P.C.) The same case is an authority for the proposition that insurers are not estopped from relying upon a breach of this condition, merely by reason of the fact that, in spite of the claim being sent in late, they have contented themselves with a general denial of liability. On the other hand, where the insurers have condescended to state their reasons for repudiating the liability, and have not included amongst such reasons a breach of this particular condition, they will be regarded as having waived it. (*Kelly v. Hochelaga Fire Insurance Co.*, [1880] 24 L.C.J. 298.) So, too, where insurers (in a Scottish case) after receiving a notice out of time, made a requisition for a *post mortem* examination, the stipulation was held waived. (*Donnison v. Employers' Accident and Live Stock Insurance Co.*, [1897] 24 R. (Ct. of Sess.) 681.) To the like effect was the decision in the Canadian case of *Labbe v. Equitable Mutual Fire Assurance Co.*, [1906] 29 Q.R.S.C. 143, where the insurers had offered to settle the claim, though the notice sent them had been an informal one.

A modern case shows how far conduct on the part of insurers may entitle the assured to suppose that his claim had been treated as a valid one, subject to minor adjustments. In that case (*Yorkshire Insurance*

<sup>1</sup> In many standard forms the period is 30 days.

*Co. v. Craine*, [1922] 2 A.C. 541 P.C.) the insurers had taken possession of the assured's premises, and had remained in possession well after receipt of the claim. It was held that they were estopped from disputing its validity. In a recent Indian case a plea of estoppel failed.<sup>1</sup>

Nice questions have arisen as to the circumstances in which conditions must fall to be regarded as conditions precedent. It has been held that when the stipulation as to furnishing particulars is coupled with a sanction, such as is found in the condition we are examining, namely, that non-compliance will disentitle the assured to payment of his claim, the substance of the whole condition is to be regarded as creating a condition precedent. (*Stoneham v. Ocean Railway and General Accident Insurance Co.*, [1887] 19 Q.B.D. 237, 241.) It is otherwise where the sanction amounts to no more than that no claim will be payable until such time as the requisite particulars are furnished.<sup>2</sup> For, if the insurers mean more than the plain words of the sanction thus expressed would convey to the assured, and indeed that they mean to make the furnishing of particulars within a specified time a condition precedent, it is for them to say so in plain language. In the case last cited, a stipulation requiring notice of accident to be intimated within seven days was held *not* to be a condition precedent.

Turning to clause (b) of this condition, the same would seem to be redundant, having regard to the stipulations contained in condition 3, set out above.

Following upon the two other clauses in condition 11 already discussed, we meet with a sub-paragraph imposing on the assured the duty of furnishing the insurer, if called upon so to do, with various other matters of information, including documentary evidence in support of any claim made, and concerning any other fact which the insurers may reasonably require as falling within the general purposes expressed in this clause.

An example has already been given earlier in this chapter of the snare which awaits him who treats his contractual obligations under this clause in a cavalier spirit. That was the case of *Welch v. Royal Exchange Assurance etc.*<sup>3</sup> There, a timely requisition had been made by the insurers upon their assured to furnish them with information as to his banking accounts. The requisition was repeated both before and after certain arbitration proceedings (pursuant to a term in the policy) had begun. The requisition was not met in respect of certain banking accounts in the name of the assured's mother but which were operated by himself, until he was actually under cross-examination in the said proceedings. In spite of the fact that these accounts, when disclosed, exhibited nothing by which the validity of the claim, as such, could possibly be impeached, the insurers were held to be entitled to make a requisition to see these accounts for what they were worth; that the assured was bound to meet the requisition within a reasonable time; that to meet it so late as the assured had done was not to answer the requisition within a reasonable time; and that, accordingly, the insurers were entitled to avoid the claim on the ground of non-compliance with a condition precedent to its validity.

All modern contracts of fire insurance contain some provision or provisions entitling the insurer to enter upon premises which are the

<sup>1</sup> *Sheik Abdul Majid v. Motor Union Ins. Co.*, [1937] 7 Comp. Cas. 399.

<sup>2</sup> Such a condition will not entitle the assured indefinitely to delay the delivery of particulars. He must, it is said, comply within a reasonable time.

<sup>3</sup> [1936] 4 All E.R. 289; and see p. 249, *ante*.

subject-matter of insurance or in which such subject-matter is to be found. Such powers are taken for purposes which have already been indicated in the last sub-section of the present chapter. A condition with this end in view figures as No. 12, in the policy under examination. It is worded as follows:—

"12. *On the happening of any loss or damage to any of the property assured by this Policy the [Insurer] may*

- (a) *enter and take and keep possession of the building or premises where the loss or damage has happened.*
- (b) *take possession of or require to be delivered to it any property of the Assured in the building or on the premises at the time of the loss or damage.*
- (c) *keep possession of any such property and examine, sort, arrange, remove, or otherwise deal with the same.*
- (d) *sell any such property or dispose of the same for account of whom it may concern.*

*The powers conferred by this Condition shall be exercisable by the [Insurer] at any time until notice in writing is given by the Assured that he makes no claim under the Policy or, if any claim is made, until such claim is finally determined or withdrawn, and the [Insurer] shall not by any act done in the exercise or purported exercise of his powers hereunder, incur any liability to the Assured or diminish the [Insurer's] right to rely upon any of the conditions of this Policy in answer to any claim.*

*If the Assured or any person on his behalf shall not comply with the requirements of the [Insurer] or shall hinder or obstruct the [Insurer] in the exercise of his powers hereunder all benefit under this Policy shall be forfeited.*

*The Assured shall not in any case be entitled to abandon any property to the [Insurer] whether taken possession of by the [Insurer] or not."*

The purposes to be served by the powers conferred by clauses (a) to (d) above are said to be for the most part those which may be comprehended by the word "salvage"; but that as "all claims are not honest, it is of the greatest importance not only to the insurers themselves, but also to the public, that the insurers should be placed in a position to make a thorough investigation both into the details of the claim and into the circumstances of the fire, and this involves taking and keeping possession of the salvage, and the premises on which the salvage is, until the investigation is complete. . . . In many cases, it is impossible for the insurers to decide whether to contest the validity of the claim until all the circumstances attending the loss have been investigated: it frequently happens that decisive evidence showing, for example, that the claim is fraudulent does not emerge until the close of a prolonged and searching examination of the salvage".<sup>1</sup> It seems at least questionable, however, whether clauses (b) and (c) do not in terms confer powers much wider than are requisite for the aims envisaged.

It appears never to have been authoritatively decided whether complete ouster of the assured, if an owner or occupier, is necessarily involved. There is a reporter's note to the early case of *Oldfield v. Price*, [1860] 2 F. & F. 80, which suggests that exclusion of the assured is not connoted. There is also the suggestion of Cave, J., in *Scott v. Mercantile Accident & Guarantee etc.*, [1892] 8 T.L.R. 320, that where

<sup>1</sup> Thus Welford & Otter-Barry, 3rd Ed., pp. 265, 266 (where the word "salvage" is used of the articles undestroyed) in explanation, if not apology, for the Standard Form

on a fire policy the insurers set up the defence that the claim is fraudulently excessive, the Court ought not to make an order directing the salvage to be taken from the assured and kept in safe custody till the trial of the action. This *obiter dictum* was, however, earlier than the standard form we are now considering, and its only value today is indicative of the view held by a great judge that the rights of an assured as to the user of his property ought not to be completely sacrificed, or even obacured, for the single interests of the insurer.

The second paragraph of the condition now under examination was designed to avoid the estoppels to which reference has been made in the previous sub-section of this chapter. The clause also seeks to avoid the liabilities which the insurers were held to have incurred in the interesting case of *Ahmedbhoy Habbibhoy v. Bombay Fire and Marine Insurance Co.* to which attention has earlier been drawn in the present chapter.<sup>1</sup> That case, it will be remembered, made the insurers liable for their own neglect of valuable machinery, whereby the same had much depreciated in value while they were in possession of it, pursuant to the exercise of powers not unlike those conferred by this condition.

It is astonishing to find parties to commercial and domestic fire insurance policies, who seek genuine protection thereunder, agreeing at all to the inclusion of a clause so worded as is the last-named.

In some colonial policies a clause has found favour alike with insurers and assured, and has indeed become a statutory condition in Canada (Ontario) since 1897, whereby insurers undertake to bear their share of loss and damage consequent upon salvage operations. The standard condition referred to deals also with the topic of abandonment, and reads as follows:—

*"Where property insured is only partially damaged, no abandonment of the same will be allowed unless by the consent of the company or its agent, and in case of removal of property to escape conflagration the company will contribute to the loss and expenses attending such act of salvage proportionately to the respective interests of the company or companies and the assured."*

Since, at any rate, *Castellain v. Preston*, [1883] 11 Q.B.D. 380, 403, C.A., it is well settled<sup>2</sup> that there is not in fire insurance anything corresponding to a constructive total loss, such as may be effected in marine insurance by a proper notice of abandonment.<sup>3</sup>

Nevertheless, were an insurer consciously to accept abandonment by his assured to him of property wholly or partially damaged by fire, he might find himself landed with disagreeable liabilities to third parties. To avoid anything of the kind, most standard forms of condition include some such provision as is to be seen last in the condition we are now examining. As the insurer, if he pays an indemnity, has a right to the salvage (for otherwise an assured, by keeping the salvage as well as the indemnity, would be over compensated), the effect of the last-named stipulation is to enable the insurer to decide for himself what he will retain.

It will be noticed that the sanction for non-compliance with any of the stipulations included in this condition, is the drastic one of forfeiture.

<sup>1</sup> See p. 219, *ante*.

<sup>2</sup> The doctrine was re-stated in a modern case by Lord Atkinson. (*Moore v. Evans*, [1918] A.C. 185, 194.)

<sup>3</sup> As to which see Chapter IV, pp. 194-205, *ante*.

(vii) *Option to reinstate or replace.*

As already pointed out very early in the present chapter, the development of insurance business on modern lines showed reinstatement or replacement of property damaged or destroyed by fire to have proved a convenient alternative to the payment of monetary compensation.<sup>1</sup> Accordingly, there has been evolved and incorporated in one of the standard conditions a number of provisions giving insurers an unqualified option in this matter of compensating their assured, while providing themselves with a number of special safeguards. In the policy under examination, one of such standard conditions has been incorporated as number 14. It reads as follows:—

"14. *The [Insurer] may at [his] option reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage, or may join with any other Company or Insurers in so doing, but the [Insurer] shall not be bound to reinstate exactly or completely, but only as circumstances permit, and in a reasonably sufficient manner, and in no case shall the [Insurer] be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such loss or damage, nor more than the sum assured by the [Insurer] thereon.*

*If the [Insurer] so elect to reinstate or replace any property the Assured shall, at his own expense, furnish the [Insurer] with such plans, specifications, measurements, quantities, and such other particulars as the [Insurer] may require, and no acts done, or caused to be done by the [Insurer] with a view to reinstatement or replacement shall be deemed an election by the [Insurer] to reinstate or replace.*

*If in any case the [Insurer] shall be unable to reinstate or repair the property hereby assured, because of any municipal or other regulations in force affecting the alignment of streets, or the construction of buildings, or otherwise, the [Insurer] shall, in every such case, only be liable to pay such sum as would be requisite to reinstate or repair such property if the same could lawfully be reinstated to its former condition."*

As in the case of all other so-called "standard" forms, this condition has been designed to avoid the effect of a number of judicial pronouncements by which the holders of policies of insurance might do better than would be at all convenient to insurers generally. For example, it had been decided so far back as 1859 that on an insurer exercising his option to reinstate, there was thenceforward no longer a contract to pay a sum of money, but to reinstate the property. (*Brown v. Royal Insurance Co.*, [1859] 1 E. & E. 853, 858.) And in the same year it was decided that an insurer was liable for the consequences of his failure to perform it adequately. (*Times Fire Insurance Co. v. Hawke*, [1859] 28 L.J. (Ex.) 317.) The Court in the first of the two cases named had pointed out that the election carried with it, as a matter of law, a duty so to recondition the premises as at least to restore the *status quo ante*, and that if, in discharging this duty, the insurers had found it more expensive than they had bargained for, still "they must either perform their contract or pay damages for not performing it". It was later decided in a colonial case (*Smith v. Colonial Mutual Fire Insurance Co.*, [1880] 6 Vict. L.R. 200) that where a second fire occurred during the process of reinstatement

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<sup>1</sup> See p. 216, *ante*.

the assured was not concerned, and the insurers must be regarded as their own insurers in such an event.

Again, in the second of the cases cited above it had been held that if, owing to bad workmanship, the assured has had to undertake the work over again, the insurers are liable to him for the expense to which he has been put, leaving them, of course, with a right of action against the person responsible for the original bad work.

All the foregoing disobliging circumstances are avoided by the standard condition as drawn. In the first clause the expression "reasonably sufficient manner" at first sight seems less advantageous to the assured than an obligation "to put the house substantially into the same state as before the fire"—an obligation not, however, carrying with it any necessity to pull down the old walls and rebuild them on account of some defect in their foundation—which was the way *Channel, B.*, described the liability of an insurer who had elected to reinstate. (*Times Fire Insurance Co. v. Hawke, supra*, at p. 407.) It is submitted, however, that the only proper way to construe the standard obligation in the foregoing respect is to treat the *dictum* of *Channel B.*, cited above, as the proper test of what is "reasonably sufficient".

Clause 2 of the condition seeks to avoid the incidence of the settled law in the following particulars. To constitute an election, in the sense of choosing between making a money payment or reinstating or replacing the property, no formal statement on the part of the insurer is necessary; it is sufficient if his conduct be such as would entitle his assured to believe that the choice had been made. The point is of no small importance to the parties, since an election once made cannot be withdrawn. (*Sutherland v. Sun Fire Office*, [1852] 14 Dunl. (Ct. of Sess.) 775.) Examples of conduct held indicative of the choice having been made are *Scottish Amicable Heritable Securities Association v. Northern Assurance*, [1883] 11 R. (Ct. of Sess.) 287, where negotiations had all along gone forward on the footing that there was to be a money payment; and *Lalande v. Phoenix Insurance Co. of Hartford*, [1918] 54 Q.R.S.C. 461, where the question of the amount payable had, with the consent of the insurers, been referred to arbitration. The effect of these decisions was in each case to create estoppels which the clause we are examining is designed to avoid. It is submitted, however, that it will afford no shelter to an insurer who unreasonably delays a clear indication of the exercise of the option he thus secures to himself, and that it does not operate in bar of the principle that his election once made cannot be revoked.

The remaining clause in the condition under examination calls, it is thought, for no comment.

#### (viii) *Reinstatement by the assured.*

Read as a whole, the condition examined above will be found to debar the assured from himself undertaking the work of reinstatement unless he has notified the insurers that he proposes to make no claim upon them under the policy, or unless, having made no such statement of his intention, the insurers shall have made their own election in the matter, and in so doing have indicated that they will answer the claim by a money-payment. For the assured may not hamper his insurer in the work of reinstatement if the latter shall have made his choice in that direction—indeed, we shall shortly see that an assured may (where an appropriate stipulation occurs in the contract) be required in some sense to co-operate. But where there is a clear indication that the

insurer will make a money-payment, there is no bar to the assured carrying out any work of reinstatement or replacement which he may consider desirable, and afterwards applying the money received towards the expenses so incurred. Naturally he must be responsible himself for any difference between the actual cost of the work he thus executes and the amount recoverable under the policy. He cannot charge the insurer for any balance. As between insurer and assured, the latter may deal with the indemnity paid him as he pleases, for the money so paid him is his own. It is otherwise as between himself and some other party to another contract whereby he may be obliged to apply the whole of the insurance money to the work of reinstatement. It is, indeed, common in contracts between lessors and lessees, mortgagors and mortgagees, for conditions to be inserted, making it obligatory on one of the parties not only to insure the property against fire, but to apply the proceeds of any money payable under the policy to the work of reinstatement. And it may well be that an insurer may, in some manner, be made privy to some undertaking of that character. So, it has been suggested, that if for some reason amounting to sufficient consideration in the law of contract the assured has made an express promise to his insurer that he will apply the indemnity paid him towards reinstatement or replacement as the case may be, and the insurer has made to the assured a payment in money upon the faith of that undertaking, an action may lie against the assured to compel him to perform it (*Queen Insurance Co. v. Vey*, [1867] L.T. 239.) As for other persons interested in the property, it has been held that they cannot themselves proceed with the work of reinstatement and then charge the costs thereof against the insurers. (*Simpson v. Scottish Union Insurance Co.*, [1863] 1 Hem. & M. 618, 628.)

(ix) *Reinstatement by statute.*

In the case last cited the plaintiffs considered that they might charge the insurers with the cost of the work done, chiefly on the ground that it was a case where the insurers were bound to reinstate by virtue of the provisions of a special statute. That statute is the Fires Prevention (Metropolis) Act of 1774 (14 Geo. 3, c. 78), which has been construed as applicable to the whole realm of England, but not to Scotland or Ireland. Anyhow there are no such nice questions in India as to whether insurers can, in certain instances, be compelled by *mandamus* to reinstate.

(x) *Losses consequent upon reinstatement.*

It may be useful to the student at this point in our discussion of the topic of reinstatement, to point out that losses arising out of the act of reinstatement are, of course, not covered by the policy. They must in consequence be covered by separate insurance. The state of things envisaged is, of course, a fit subject of insurance, and in practice a great deal of modern business of this character is undertaken. It is sometimes specifically referred to as "consequential loss" insurance. The more usual losses covered by such special contracts are loss of rents or profits, and the additional cost which often has to be met in order to keep a business going while the work of reinstatement is proceeding. In a recent case it has been held that the cost of partly manufactured goods, if purchased for the purpose above-named, will rank for inclusion in

what is covered by a policy on increased cost of working. (*Booth v. Commercial Union Assurance Co.*, [1922] 14 Ll. L.R. 114.)

Consequential loss policies may also be effected to cover standing charges such as salaries and wages. These, and kindred "overheads", are payable out of earnings, and it is said that what is recoverable under such heads of claim by a consequential loss policy in the usual form, is cover to the extent only to which these overheads would have been earned if no fire had occurred. (*Mount Royal Assurance Co. v. Cameron Lumber Co.*, [1934] A.C. 313 P.C.) The last-named case is an authority also for the proposition that in order to estimate probable earnings for the purpose of such cover, a Court may accept a method of valuation, if widely recognised in the relative industry, though such method might be described as arbitrary.

#### (xi) Replacement.

There may be said to have grown up a distinction, in the law relating to insurance, between reinstatement and replacement<sup>1</sup>, the latter connoting the provision of something similar to an article which has become consumed or damaged by fire. But, in strictness, mere provision of a similar object is not enough; since, in order to restore the *status quo ante*, a similar object should be placed where the original object injured or destroyed had stood. Sometimes, it may be quite possible to achieve this end; in which case, nothing short of a replacement in the sense stated will meet the obligation created by the policy. In other instances, so strict a re-creation of the *status quo* may be impossible of achievement, when it would seem to be the path of wisdom not to attempt it, but *pro tanto* to offer an indemnity in terms of money. It may, however, be quite unreasonable to insist beyond a certain point upon the element of locality in the replacement attempted, as where by reason of the destruction of the locality in which property in the nature of chattels had been placed, or by reason of the assured himself being unable legally to return there, it was held that such circumstances would not prevent an insurer from exercising his option to replace, and that the assured might require the insurers to replace the property within a reasonable distance of the former locality. (*Anderson v. Commercial Union Assurance Co.*, [1885] 55 L.J. (Q.B.) 146 C.A.)

#### (xii) Co-operation.

The history of fire insurance has exhibited instances where the assured has hampered the work of salvage, or otherwise contrived to obstruct insurers in exercising their rights under the relative policy. Experience has shown that a mere negative stipulation is not enough to protect insurers from conduct of this character; that, apart altogether from the question of interference, there is much which insurers must need accomplish before they can determine their final attitude to a particular claim; and that the assured, being in most cases on the spot, generally has means at his disposal of which, except through him, the insurers could not avail themselves. It would obviously be reasonable, therefore, to make provision for co-operation and assistance on the part of the assured. So far as any such active assistance may involve an

<sup>1</sup> The distinction is at once artificial and modern. In the older cases the word "re-instatement" is often used indifferently for reconstruction or repair of buildings and of the replacement of similar goods and chattels, whether the last-named be chattels real or chattels personal. It strikes the author, however, that this distinction, if consistently applied, would be useful.

assured in expenses which he would not otherwise incur, it cannot but be fair that the insurer agree to meet them.

Thus the more modern standard policies contain an *omnibus* condition, designed to meet all the aforesaid circumstances. In the policy under examination it stands as condition No. 15 and reads as follows:—

*"The Assured shall, at the expense of the [Insurer], do, and concur in doing, and permit to be done, all such acts and things as may be necessary or reasonably required by the [Insurer] for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties to which the [Insurer] shall be or would become entitled or subrogated upon the [Insurer] paying for or making good any loss or damage under this Policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the [Insurer]."*

#### (xiii) Contribution.

The topic of contribution has been dealt with more or less at large much earlier in this treatise, and again with some particularity in the previous chapter.<sup>1</sup> The scale of this work does not permit a re-statement either of the doctrine itself or of the examples of its application which have already been given. In the policy under examination the subject of contribution finds a place in some two of its conditions. These are 16 and 17. They are drawn in accordance with a well-known standard form and respectively read as follows:—

*"16. If at the time of any loss or damage happening to any property hereby assured, there be any other subsisting assurance or assurances, whether effected by the Assured or by any other person or persons, covering the same property, this [Insurer] shall not be liable to pay or contribute more than [his] rateable proportion of such loss or damage."*

*17. If the property hereby assured shall, at the breaking out of any fire, be collectively of greater value than the sum assured thereon, then the Assured shall be considered as being his own assurer for the difference, and shall bear a rateable proportion of the loss accordingly. Every item, if more than one, of the Policy shall be separately subject to this condition."*

#### (xiv) Arbitration.

The subject of arbitration has already been referred to in the 13th condition of the policy under examination.<sup>2</sup> The relative condition providing for a submission to arbitration is No. 18 and reads as follows:—

*"If any difference arises as to the amount of any loss or damage such difference shall, independently of all other questions, be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of*

<sup>1</sup> See pp. 65-67 and 208, *ante*.

<sup>2</sup> See pp. 266, 267, *ante*.

notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively; and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage, if disputed, shall be first obtained."

The student should note that the right to go to arbitration being a term of the policy cannot be invoked where the contract itself is repudiated. The student will notice from the case-law cited below that what amounts to repudiation is a mixed question of law and fact.

The clause as drawn would appear to limit the subject-matter of arbitration to the amount of the loss and damage. The words "*independently of all other questions*" being of themselves, it is submitted, wholly insufficient to found a submission to arbitration of any other matter in dispute. The limited nature of the submission contemplated is further evidenced by the terms of the sentence with which the condition concludes.

This particular condition is one of the standard conditions, and fell to be considered in India in the case of *Eagle Star and British Dominion Insurance Co. v. Dinanath Hemraj*, [1923] 47 Bom. 509. The same Court in the same case had to consider the rights of the parties under standard condition 19 which (as in the policy now under examination) ran:—

"In no case whatever shall the [Insurer] be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

The Court had also to consider the corresponding rights of the parties under the last clause of standard condition 13 which has been discussed in a preceding sub-section of this chapter.<sup>1</sup>

In that case, the material facts were that the relative fire had broken out on the 21st March 1921. Verbal notice had been given to the insurers the same day, and a notice in writing followed the day after. The insurers notified the plaintiff forthwith that their surveyors would look into the matter; but much delay then ensued, and it was not until the 22nd September in the same year that the surveyors rendered their report, which the plaintiffs were not permitted to see. On the 14th December, the plaintiffs called on the insurers to go to arbitration. No reply was received. A reminder was sent on the 6th January 1922; and on the next day, the defendants wrote alleging a difference as to the amount of the loss or damage, and indicating vaguely that there might be "other questions involved". On the 10th January 1922, the plaintiffs wrote to ask what were the "other questions involved" and two days later, the insurers' attorneys wrote "our clients do not agree upon

<sup>1</sup> See pp. 266, 267, *ante*.

the amount claimed and . . . . . they cannot yet admit liability upon the policy . . . . .”

The plaintiffs then commenced their action against the insurers in which they stated that the latter's object was to delay matters until they could take advantage of conditions Nos. 13 and 19; that condition No. 18 (arbitration) was limited to disputes concerning the amount of loss or damage. They contended further that the effect of the letter of the 12th January 1922 was to reject their claim. The suit was for a declaration that the insurers were not entitled to reject the plaintiff's claim *in toto*, and were only entitled to dispute the amount of loss or damage; a declaration that, in the events that had happened, the plaintiffs were not bound by the arbitration clause; and, in the alternative, they prayed that in any event all matters in dispute other than the amount of loss or damage might be determined by the Court. Both the Judge of first instance and the Judges of the Court of Appeal held the insurer's letter of the 12th January 1922 to constitute a rejection of the plaintiff's claim. The last-named Court read the arbitration clause as limited in the manner contended for by the plaintiffs, and accordingly held that the plaintiffs, in any event, were entitled to sue for the purpose of determining the propriety or otherwise of the insurer's rejection of their claim. The Court did not feel called upon to decide the further question whether the amount of loss or damage would have to be determined by the Court on the ground which had appealed to Lord Haldane in *Jureidini v. National British and Irish Millers Insurance Co.*, [1915] A.C. 499, 506, that the arbitration clause had gone with the repudiation.

The last-named Bombay case, as also *Jureidini's* case, was considered by the High Court of Calcutta in *Bejoy Lal Mukherjee v. New India Assurance Co., Ltd.*, [1936-37] 41 C.W.N. 339, a case in which the rights of the parties under these three identical standard conditions fell also to be determined.

The facts in the Calcutta case were complicated by the form in which the plaintiff's claim had been rejected. The plaintiff's claim was for Rs. 20,000. The defendants seemed prepared to admit loss and/or damage to the extent of Rs. 8,000 but alleged that the difference between the two figures was so great as to entitle them to stigmatise the claim as fraudulently excessive, and thus to say that, by virtue of the 13th condition, all benefits under the policy were forfeited. The Court (Derbyshire, C.J., and Costello, J.) were unanimous in holding that the facts were not within the view apparently entertained by Lord Haldane and Dunedin in *Jureidini's* case (*supra*), but were within the judgment of Lord Reading in *Stebbing v. Liverpool & London & Globe Insurance Co.*, [1917] 2 K.B. 433, 437, in that, so far from repudiating the contract, the insurers were relying upon that contract as entitling them to reject the claim. The right to insist upon forfeiture was a right which accrued under condition 13. In the result, and as the plaintiff, in reliance upon the contract, had, in fact, gone to arbitration and obtained an award, judgment was entered for him for Rs. 19,500. The case is unusual in that it was the insurers who contended that they had meant to repudiate the whole contract, and the assured who contended that the former had not succeeded in doing so. The Court of Appeal accepted the plaintiff's argument that the allegation of fraud, in the particular circumstances, did not get rid of the fact that there was an actual difference between the parties as to the amount of damage, and consequently that the assured was entitled to have the difference between the parties as to that settled by arbitration.

A recent case in India exemplifies the application of strictly equitable doctrines in determining the rights of parties under a policy of fire insurance. (*Kanahya Lal Lohia v. Assicurazioni Generali*, [1939] 9 Comp. Cas. 23.) The material facts were that the plaintiff had taken out a number of policies during the months of September, October and November 1936 covering jute stored in certain godowns. The policies were issued subject to a number of local standard warranties known as the "Calcutta and Howrah Jute Press Tariff Warranties of the 15th of June 1937". These warranties bore serial letters and followed a general declaration in these words: "*It is warranted during the currency of this policy (all and each of such warranties being of the essence of the contract and the insured forfeiting all rights and benefits under the policy by any breach or breaches thereof) that . . .*"

The material portion of clause (M) of the local warranties so incorporated read as follows:—

" . . . . . The term 'godown' in this warranty shall mean the following and shall be incapable of having any other meaning :

(i) Any separate self-contained building (with or without partitions) situate at a distance of 14 feet or more from any other building, or any separate self-contained building situate less than 14 feet from another building provided that every wall thereof facing any such other building whether directly or obliquely shall be built of brick or stone without openings of any kind or if containing openings such openings being protected at all times by approved corrugated iron doors and/or shutters, unless such wall in any such other building is built of brick or stone without openings of any kind, or

(ii) any compartment or part of any building which complies with sub-cl. (i) hereof provided that such compartment or part is separated from the whole of the rest of the building of which it forms part by perfect party walls built of brick or stone without openings of any kind or if containing openings such openings being protected at all times by double fire-proof doors and/or shutters, or

(iii) any two or more compartments or parts of any building which complies with sub-cl. (i) hereof, which are as a whole separated from all other parts of the said building by such walls as are described in sub-cl. (ii) hereof, or

(iv) any group of two or more separate self-contained buildings situate at a distance of less than 14 feet from each other provided that if any part of any wall or any building in such group shall be situate within 14 feet of any building not forming part of such group the whole of such wall shall be constructed in the manner described in sub-cl. (i) hereof".

It appeared that the godowns were of the general character contemplated by the policy but that, with the knowledge and approval of the insurers a special water-sprinkling system was to be installed which would involve the making of a number of relatively small openings in the walls through which the various necessary pipes would have to be led. It was common case that the work of perforating the walls to admit the passage of these pipes had begun when, on the 1st of December 1936, the fire occurred which gave rise to the claim in suit. The evidence was conflicting as to whether, after the outbreak, every such opening had been effectively closed. The findings of interest were (1) that the holes made in the walls were not "openings" within the meaning of the terms of the contract, as those terms were meant to refer only to openings permanent in character and of substantial size;

(2) even assuming that the holes were "openings" within the meaning of the contract, the insurance company had, by implication, waived the term and acquiesced in the work being carried out as quickly as possible. In the circumstances it was inequitable for the insurers to rely upon their right. Lord-Williams, J., further expressed the view that in construing policies of insurance the *strictum jus*, or, as it is sometimes called, the *apex juris*, is not to be clung to, since policies are to be construed largely for the benefit of trade and for that of the insured.<sup>1</sup>

(xv) *Limitation.*

The subject of limitation, i.e., of the time within which an assured is given an opportunity to make his claim prevail, is the subject of some three provisions. These have already been touched upon in the present chapter, but as allusions to limitation are scattered about the various conditions, it seems useful both to bring them together and to summarise their effect.

**The claim.**—The claim itself by virtue of condition 11 must be forwarded within 15 days of the fire, or within such extended time as the insurer may expressly *permit in writing*.

**Enforcement of the claim.**—By virtue of the second clause of condition No. 13, if the insurers dispute the *quantum* of damage or the way in which the loss or damage has been put forward in terms of money, that question must go to arbitration: in which case no suit upon the policy can be instituted after three months counted from the date when the arbitrator or arbitrators (or, in the case of disagreement between the arbitrators, the umpire) shall have made the award.

If, however, the *quantum* of the loss or damage be not in dispute, but the insurer rejects the claim upon any other ground contemplated by the policy, e.g., insufficiency of insurable interest or breach of any of the conditions, etc., no such ground of rejection can be compulsorily agitated before the arbitrators under condition 18.

In such an event, therefore, by virtue of the second clause of condition 13, a suit to enforce the claim must be instituted within three months of the date when the claim was rejected.

The facts of the two Indian cases cited in sub-section (xiv) of the present chapter afford examples of what has been held to amount to a repudiation of an assured's claim, as also of what amounts to such a difference between the parties upon the topic of loss and damage as would entitle either of them to have that difference adjudicated upon by arbitration.

In a recent case in Rangoon (*Universal Fire and General Insurance Co. v. Japan Cotton Trading Co.*, [1926] 5 Rang. 208) the material facts were that one C. had taken out two policies of insurance on certain premises used as a ginning factory, as also upon stocks of cotton and other goods there. Both these policies purported to have been assigned to the Japan Cotton Trading Co. A fire having broken out on the 5th of March 1923, claims were put in both by C. and the purported assignees. Meanwhile C. was prosecuted both for cheating and for the crime of arson. In both cases C. was eventually discharged. The operative date of such discharge in the case of arson was the 24th of December 1923. Three months later, namely on the 4th of March 1924, C. and the Japan Cotton

<sup>1</sup> See for another breach of warranty (not to store hazardous goods) *Sk. Abdul Majid v. Motor Union, etc.*, [1937] 7 Comp. Cas. 399.

Trading Co., as joint plaintiffs, instituted their suit for the recovery of Rs. 52,368-7-7 on the two policies. The judge of first instance decided that the second plaintiff had no insurable interest, but he decreed the suit in favour of C. for Rs. 41,468-8-8. The insurers appealed on the ground, *inter alia*, that the claim had been rejected more than three months before the date when the suit was filed, and that therefore, under condition 13 of the policy, the suit was barred by limitation. In support of the above contention the insurers relied upon letters addressed to the Japan Trading Co., in which the point was taken by the insurers' solicitors that their clients did not appear to be under any liability towards the Japan Trading Co.

The Court held, however, that this was no clear repudiation of the claim on the policy, and laid it down that "before so stringent a condition as condition 13 of the policy can be enforced, it is clear that there must be very definite or clear evidence of repudiation". Upon the evidence, the Court found, as facts, that at the time when the correspondence relied upon by the insurers was taking place, the prosecution of C. was still proceeding, and that the appellants wished the matter of the claim to be kept in abeyance until those proceedings had terminated; and that it was not until after the conclusion of the criminal proceedings, and actually within three months of the institution of the suit, that the claim was clearly and finally repudiated.

(xvi) *Onus*.

The general rule of law is that he who admits to a contractual relationship and to a claim being made against him in virtue of that relationship, but who takes upon himself to say that for certain reasons he may lawfully avoid the particular liability which the claimant seeks to enforce against him, must assume the burden of proving all material fact or facts on which he relies for establishing that defence. It is thus long-settled law that he who confesses but seeks to avoid, must take upon himself the *onus* of proving affirmatively *how* he avoids.<sup>1</sup>

Applying that principle to contracts of insurance, it might be expected that an insurer who admits the policy and admits the relationship of insurer and assured, but sets up the case (for example) of the breach of some condition, must accept the *onus* of proving the breach relied upon. We shall find that this rule prevails unless the insurer succeeds in contracting out of it.

Experience shows that in many instances the rule works hardship on insurers. Accordingly, they have in various directions sought to shift the *onus* from themselves to the assured. This is not to say that they can alter the law relating to the burden of proof. On the contrary, it is because they cannot alter that law, that they have sought to obtain the assent of the would-be assured to a number of express conditions, the effect of which is, *pro tanto*, to deprive the latter of his right under the general law to have every allegation of a breach of the contract proved against him. The following are instances of clauses so framed as to shift the burden of proof. The references are to the policy under examination:—

(a) In condition 4, where, by the second proviso, the assured is shouldered with the burden of proving that any fall or displacement is actually caused by the fire.

<sup>1</sup> In terms of the adjectival law relating to Pleadings, a defendant who finds himself in this position is said to be putting in a plea of "Confession and Avoidance".

(b) In condition 6 the assured is similarly made to bear the burden of proving that the loss or damage he has sustained is outside the remarkably wide series of exceptions which that condition embraces.

Looked at more closely, this deprivation of an assured's right in law to have the facts relied upon by his adversary proved against him, is, in many of the circumstances contemplated, rather apparent than real. For by the relative law of evidence in India expressed in section 106 of the Indian Evidence Act<sup>1</sup> where any fact is expressly within the knowledge of any person, the burden of proving that fact is upon him. Thus, although it may turn out in a particular case that the assured at the moment may be no better informed than his insurers as to the origin of the fire which led to the loss and damage for which the indemnity is sought, it must at least be conceded that, as between an insurer and his assured, it is the latter who, in the generality of cases, is more likely to be able to give the real answer to the material questions touching the circumstances which gave rise to, or immediately surrounded, the loss and damage involved. With this view in his mind, then, if the student will look at the several exceptions contemplated by conditions 4 and 6 in the policy we are examining, he will, we think, agree that on the whole it is reasonable to place the burden of proving the material facts which would enable the claim to succeed upon the claimant himself, rather than upon the insurer who has to meet it. And in that view there would appear nothing unfair in making any potential claimant accept such an obligation as a term of his contract.

In the result, therefore, save to the extent described above, the *onus* of establishing that the circumstances surrounding a claim are such as to take it out of the contract of insurance, rests upon the insurer.

So, if an insurer seeks to avoid the policy on the ground of fraud, the burden is on him to prove not only fraud as such, but the particular fraud alleged; and to do so with the utmost exactitude. It is a trite saying that to succeed as a defence, fraud must be proved "up to the hilt".<sup>2</sup> Again, if acts of commission or omission on the part of the assured be relied upon as entitling the insurer to treat the former's rights under the policy as forfeited, it is for the insurer himself to establish affirmatively the nature of the conduct he relies upon. It has indeed been held in at least one case (*Barrett v. Jermy*, [1849] 3 Ex. 535, *per* Parke, B., at p. 542) that where an insurer is relying upon the absence of some notice on the part of his assured, it is for the former to prove that no notice as required by the particular condition or conditions relied upon was in fact received. In like manner, where the insurer is relying upon some alleged mis-description or misrepresentation, or upon an alleged concealment of a material fact, the *onus* is entirely upon him to establish the truth of the allegations he makes. Sometimes an over-valuation on the part of an assured may be such as to make the statement, however innocently made, so gross a mis-statement as to entitle the insurer to avoid the policy. The doctrine depends upon the insurer's right to a truthful statement of every material fact; and a statement as to value may be within that category. This is necessarily the case where the policy happens to be a valued policy. In practice, such policies are rarely found in fire insurance

<sup>1</sup> Act I of 1872.

<sup>2</sup> The metaphor is derived from the notion of a man defending himself by counter attacking his adversary with a drawn sword under conditions so desperate that, to be successful, he must run that sword into the body of his enemy right up to the place where his hand grasps his weapon. The place where a swordsman grips his sword is called the "hilt".

business. Naturally where such a circumstance happens to be material, over-valuation, if deliberate, may be so gross as to amount to fraud. If, then, an insurer relies upon over-valuation as a ground for avoiding the policy, it is but reasonable that upon him should devolve the duty of establishing such over-valuation as a fact, and so it has been held in Canada. (*Harrison v. Western Assurance Co.*, [1903] 1 Com. L.R. 490.)

(xvii) *Determination.*

The policy under examination contains a provision whereby the assurance may be terminated. The relative condition is No. 10 and is in the following words:—

*"This assurance may be terminated at any time at the request of the Assured, in which case the [Insurer] will retain the customary short period rate for the time the Policy has been in force. This assurance may also at any time be terminated at the option of the [Insurer] on notice to that effect being given to the Assured, in which case the [Insurer] shall be liable to repay on demand a rateable proportion of the premium for the unexpired term from the date of the cancelment."*

From the above condition it will be seen that both sides may bring the contract to an end: the assured by requisition on the insurer, on terms of forfeiting a customary sum, by way of consideration for the risks run during the time the policy has been in force; by the insurer, on notice to his assured, when a rateable proportion of the premium already paid is returnable. The condition is silent upon the factor of time. It would seem, therefore, that either party may, in effect, cancel the contract with immediate effect.

Apart from so special a clause, such as that to which the attention of the reader has just been directed, the policy may be determined by reason of the operation of an agreed time factor: as where goods are insured till their delivery to the buyer, in which case the contract determines if and when such delivery is made. Where no time is expressed within which the property covered by such an insurance is to be delivered, the contract remains in force for a time reasonable, in the circumstances, to effect such delivery. (*Allagar Rubber Estates v. National Benefit Assurance Co.*, [1922] 12 Ll. L.L.R. 110, C.A.)

### 13. *Double and Over-Insurance.*

As already pointed out, the law permits a man, unless he be actuated by fraud, (a) to put any value he chooses upon his property, (b) to decide upon the amount of money which he will accept as a complete indemnity, and (c) to insure with whom he pleases and with as many insurers as he can find. When the assured has placed an exaggerated value on the property at risk, or has covered himself on one policy in an amount out of all proportion to the real value of that property, he is said to be over-insured. So, too, where he has obtained more than one policy upon the same subject-matter, he is said to be doubly insured; and where the aggregate of the sums for which he is insured under all the policies taken together, exceeds the value of his real indemnity, he is said to be over-insured by double, or multiple insurance, as the case may be. Under the law, no matter how many policies he may have obtained in respect of the same subject-matter, an assured can get no more than the value of the subject-matter lost to him. This is so because his

contract is fundamentally one of indemnity; and he cannot be allowed to receive a sum of money exceeding that which would provide the indemnity.<sup>1</sup> It is thus of the utmost importance to an insurer that he should know the extent of the cover which the assured may have obtained from others. And, as pointed out in *National Protector Fire Insurance Co. v. Nivert*, [1913] A.C. 507, 511 (P.C.), a person over-insured may be not too careful in the protection of his property against fire. There is no double insurance where the policies cover different risks. Thus the overlapping of a fire policy upon goods in transit by rail and a marine policy covering them against fire in a warehouse, will not be an example of double insurance requiring notification to both the insurers concerned. (*Australian Agricultural Co. v. Saunders*, [1875] 10 C.P. 668, 674.) Similarly, the insuring of the same subject-matter by a number of policies, each taken out by a separate person having an individual and different interest in the property at risk, is not within the notion of double insurance. The classical case upon the topic of double insurance is *North British and Mercantile Insurance Co. v. London, Liverpool & Globe Insurance Co.*, [1877] 5 Ch.D. 569, C.A. A condition against double insurance, if breached, must render the policy void, for the reason that a contract of insurance is, unless apt words are used to produce another effect, an entire contract and not severable.

#### 14. Assignment.

The law relating to assignment of policies has been, it is thought, as fully dealt with in an earlier chapter as is consistent with the scale of this treatise. The student of fire insurance is, therefore, referred to the foregoing exposition of the law alluded to.<sup>2</sup>

#### 15. Forfeiture.

The reader will have noticed two examples of conditions appearing in the specimen policy which we have been examining, where the sanction for any breach is forfeiture of all benefits under the policy. Like all other stipulations made for the exclusive benefit of one party to a contract, the party so benefited may, if he so choose, waive the stipulation. So, if the insurer does not insist upon the forfeiture, the benefits to the assured conferred by the policy will subsist. What amounts to a waiver of any right under a contract is a mixed question of law and fact. An act of waiver may be either express or implied. In the case of an unpaid premium, for instance, where forfeiture is the sanction imposed by the contract for non-payment thereof, its acceptance after breach will operate as a waiver of the condition.

**Alien enemies.**—Rights under a policy of fire insurance are not forfeited by operation of law merely because one of the contracting parties becomes an alien enemy. The true view of the matter is that payment under the policy is suspended till war has been succeeded by peace. It has been held, however, that because payment to an alien

<sup>1</sup> In a valued policy the value stated is conclusive between insurer and assured; each being precluded from asserting the real value to be otherwise than what is stated. For this reason, fire insurance business upon a valued policy basis is not common.

<sup>2</sup> See Chapter III, pp. 82 *et seq.*, *ante*.

assured may be suspended, his rights to payment ultimately are preserved so long as he performs his allotted duties under the contract. If he fails in this, however, his policy will lapse. (*Halsey v. Lowenfeld*, [1916] 2 K.B. 707; *Seligman v. Eagle Insurance Co.*, [1917] 1 Ch. 519; *Tingley v. Muller*, [1917] 2 Ch. 144; *Zinc Corporation Ltd. v. Hirsch*, [1916] 1 K.B. 541.)

In the last-named case, the right of the Crown at common law to take possession of an alien's property situate anywhere within the King's Dominions where the common law runs, and to exercise proprietary rights over such property, was considered. It has been said that, save for the rights of the Crown over an alien enemy, there is no forfeiture of an alien enemy's rights under a contract. (*Halsey v. Lowenfeld* (*supra*); *Re Hilckes*, [1917] 1 K.B. 48; *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft*, [1918] A.C. 239.) But the distinction must be observed between rights and remedies. It is the former which are preserved to the alien enemy, and the latter which are kept in abeyance. (*Janson v. Driefontein Consolidated*, [1901] 2 K.B. 419; and on appeal, [1902] A.C. 484.)

### 16. What is recoverable.

What is recoverable is, in theory, compensation for the *actual* loss. As every policy contains a statement of the maximum sum for which the insurer agrees to be liable, it follows that in practice an assured can only get a sum covering his actual loss if and when the real indemnity does not exceed the agreed indemnity. Partial loss needs skilled assessment; and what is payable in respect of a partial loss is a matter for calculation based upon a skilled survey of the damage done.

Under a valued policy both parties are concluded as to the measure of the indemnity in respect of a total loss; under an unvalued policy the amount which would cover a total loss may well be a matter of dispute. It is for this reason that an arbitration clause is usually included in a modern policy of fire insurance; for inasmuch as what would amount to a proper compensation is purely a question of fact, it is obviously a sensible thing to leave its adjudication to commercial gentlemen familiar with the kind of considerations which help to solve debatable questions of such a character.

Those debatable questions are, however, limited by the application of certain principles of law; and it is these principles which in large measure govern the method of valuation to be adopted in particular circumstances. The law lays it down that what is recoverable is the value—whatever that may be found to be—(i) at the date of the loss or damage (*Chapman v. Pole*, [1870] 22 L.T. 306, 309; *Collingridge v. Royal Exchange Assurance Corporation*, [1877] 3 Q.B.D. 173, 176; *Westminster Fire Office v. Glasgow Provident Investment Society*, [1888] 13 A.C. 699, 704; *Phoenix Assurance Co. v. Spooner*, [1905] 2 K.B. 753, 756); and (ii) at the place of occurrence (*Rice v. Baxendale*, [1861] 7 H. & N. 96, 101; *Liverpool, London & Globe Insurance Co. v. Valentine*, [1898] 7 Q.R.Q.B. 400).

It is also well settled as a matter of principle that what lawyers call a *pretium affectionis*—the price which sentiment or affection may put upon the property at risk—is not its value for the purposes of the indemnity: that, indeed, any such artificial value must be excluded from the estimate. (*Re Egmont's, Earl of, Trusts: Lefroy v. Egmont*, [1908] 1 Ch. 821, 826.) So that it is the so-called “intrinsic” value which needs to be arrived at. Perhaps what is here meant by “intrinsic” value needs a little explanation, and this is best done in this instance by illustration. For

example, then, every holograph letter consists of paper with writing upon it: the latter will be either in ink or in some other substance capable of making the writing visible. But the intrinsic value of the letter is not the value of these materials. A letter from Napoleon Buonaparte will have a value measured by mankind's existing interest in Napoleon the man, and in the historical importance of the subject-matter of the particular letter. On the other hand the letter of any mother to any son will ordinarily be of merely sentimental value to the person addressed or to some other near relation or friend. But, again, such a letter may, by its antiquity, have acquired a curiosity, and upon that basis have attained a value far beyond anything founded on mere sentiment. In like manner the intrinsic value of a work of art such as a painted portrait, a piece of sculpture or a specimen of the jeweller's handiwork will not depend merely upon the value of the materials employed, but almost wholly upon contemporary opinion<sup>1</sup> as to the artistic merits of the object viewed as a whole. An historical interest is, of course, capable of investing any object with extrinsic interest, over and above any value which it may otherwise possess, either by reason of artistic merit, or by the nature of the materials which happen to have been employed.

"Intrinsic" value is sometimes spoken of as synonymous with "market" value, and it has been observed that in theory, market value and the cost of reinstatement should prove to be the same. In practice, however, this is frequently not the case. But the student must remember that such expressions as "market value", "intrinsic value", "cost of reinstatement" and so forth, have reference only to practical attempts which have to be made to ascertain the compensation which ought to be paid. It is not market or intrinsic value, or costs of reinstatement, which the insurer agrees to pay or the assured to accept. What the contract purports to assure is an *indemnity*, however arrived at.

As stated in an earlier part of this chapter, if replacement in kind can achieve the aim contemplated by the parties, such replacement will fulfil the contract, and no money payment will be required. In such a case, if it happen that the article replaced be slightly better than what has been destroyed, the assured gets something more than an indemnity; but the insurer, having elected to adopt this method, cannot be heard to complain of some added advantage which the assured may thus have acquired. On the other hand, if compensation in money has been paid, and paid upon the basis of the costs of reinstatement (for example the cost of new machinery in replacement of old) an allowance by way of deduction may properly be made so as to arrive at the actual value of the machinery destroyed. (*Vance v. Forster*, [1841] Ir. Circ. R. 47, 50.) It is thus evident that no single basis of calculating the value is suitable for one and all cases of loss or damage.

Experience, however, has shown that the following methods have been found to work fairly in the solution of the relative problems:—

**Stock-in-trade.**—In the case of mercantile interests the market value of stock-in-trade is taken and calculated as at the date and place of occurrence. Where there is no such market, then the value is found by taking the price at the place of origin *plus* costs of transport therefrom, and a margin representing the importer's profit. (*O'Hanlan v. H. W. Rly. Co.*, [1865] 34 L.J. (Q.B.) 154.)

<sup>1</sup> By contemporary opinion in this context is meant the opinion of well-informed persons at the date of the occurrence.

**Goods in process of manufacture.**—It seems to be generally agreed that merely to calculate upon the basis of costs of production is to arrive at less than the value of the thing covered by the policy. Since the question to be determined is the value of the article or articles *in the stage they had reached* at the date of occurrence, it may, on occasion, be not unfair to offer the price of the materials *plus* the cost of labour calculated to that date. But if the property at risk be so advanced in its process of manufacture as to require but little more attention to attain to the condition of a finished merchantable entity, then there must at least be some addition to the costs of materials and production. The *quantum* of that addition will aim at reaching a figure less, but not much less, than the price of the finished product at the factory.

**Articles in use.**—It was decided in *Grant v. Aetna Insurance Co.*, [1862] 15 Moo. P.C. 516, that the assured is not indemnified for articles actually in use unless he be paid the cost to him of resupplying himself with articles similar to, and as useful as, those which he has lost. Thus it is not market value, but the cost of reinstatement, which will meet the case. An earlier Scottish decision had reached the opposite conclusion. (*Hercules Insurance Co. v. Hunter*, [1836] 14 Shaw (Ct. of Sess.) 1137.) It is submitted that the decision of the Privy Council in *Grant v. Aetna Insurance Co.* is binding upon the Courts in India, and, anyhow, represents the better opinion.

**Buildings.**—It was pointed out in the leading case of *Castellain v. Preston*, [1883] 11 Q.B.D. 380, 400, 401, that even where the premises has an indubitable market value, such a value does not necessarily (i.e., in every case) represent a proper indemnity. In many instances such a value may well represent wholly inadequate compensation for loss of a building appropriately sited, *e.g.*, a particularly well-placed factory or school. Indeed experience shows that in most cases where a fire has resulted in the total destruction of a building, the cost of reinstatement is the only fair criterion of the value for purposes of the indemnity contemplated by the contract.

**Assessment of damage done.**—The total destruction of buildings by fire is a type of event much less common than mere damage by the same calamity. And the real practical difficulties for the most part arise in correctly estimating the value of the damage done, where destruction by fire has been only partially sustained. The business of surveying damage by fire for the purpose of assessing compensation is almost a profession in itself. A discussion of the various methods adopted in such matters is, however, wholly outside the scope of this treatise.

## 17. Subrogation and Contribution.

The principles of law which govern rights to be categorized as those of Subrogation have already been fully discussed in an earlier chapter of this treatise.<sup>1</sup> To that discussion the reader is referred. It is thought also that what has earlier been said upon the topic of Contribution<sup>2</sup> is equally applicable to the rights of several insurers who have issued fire policies in respect of one and the same property at risk. Accordingly those principles need not be restated here.

<sup>1</sup> See Chapter III, pp. 53, 63, 66, 72 *et seq.*, *ante*.

<sup>2</sup> See Chapter III, pp. 65, 66 and 77; as also Chapter IV, p. 209, *ante*.

## CHAPTER VI

# INSURANCE AGAINST LOSS BY DISHONESTY OR NEGLIGENCE

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### 1. Preliminary.

Insurance against loss of property by dishonest dealings with it or by conduct amounting to negligence is a branch of insurance business which may be said to be still in its infancy in India. Such business, however, is undoubtedly expanding. It affords, certainly, one of the most useful safeguards for the merchant or tradesman—especially for him who trafficks in gold and silver or in jewellery of any kind—for the fine art dealer, and the like. It is of equal importance to bankers, to lawyers in whose keeping a client's securities may be lodged, and to any ordinary householder who is accustomed to keep at his place of residence personal property of genuinely intrinsic value.<sup>1</sup>

A contract of insurance created to subserve any of the above purposes is personal in its nature, and, as in the case of all other contracts so conditioned, its benefits are not assignable by merely unilateral action. In other words, to validate an assignment of any of such benefits the consent of the insurer is a pre-requisite, so as to substitute one of the parties to the contract by what lawyers call a novation.

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<sup>1</sup> As to the meaning to be put upon the phrase "intrinsic value" in the law relating to the insurance of property, see the discussion in Chapter V, p. 288, *ante*.

As in the case of every other contract of insurance the parties are bound in their dealings with one another by the rule of good faith—*uberrima fides*, literally the *utmost* good faith. The contract sooner or later will be embodied in an instrument styled a policy. In practice, there is usually a cover-note, as it is called, by which insurance is secured between the period when the property at risk is agreed to be covered and the date when the policy is forthcoming. What has earlier been said in this treatise upon the subject of the form and general characteristics of a policy, upon the effect of the issue of a cover-note, and upon the topic of premium—which represents the monetary consideration for the indemnity offered—applies to contracts of the kind which are the subject-matter of the present chapter. It were inconsistent with the scale of this treatise to repeat those observations here. To the rights created by the policy those principles apply which have been already set forth and discussed earlier in this treatise under the heads of competency to contract, indemnity, assignment, subrogation and contribution. In order to read the contract aright the same canons of construction are to be applied as are requisite for doing justice to any other contract of insurance.

Inasmuch as all the foregoing topics have already been the subject of exposition earlier in this treatise, the reader is referred to the relative passages.<sup>1</sup> They need then no further exposition in what follows.

## 2. *The Policy.*

In general, policies designed to cover losses occasioned by dishonesty and in any way associated with domestic or business premises are somewhat less complicated than marine or fire policies. Commonly they recite (i) a "proposal" as having been made by the assured, and (ii) an agreement that such proposal shall be the basis of the contract, and (iii) the payment of premium. The instrument thus "attracts" the proposal and all representations which the assured has made therein. Some insurers issue to proposers a *questionnaire*, and the proposal is often so drawn as to attract as material representations the assured's answers to the questions so put to him.

In this connection the reader is referred to those discussions earlier in this treatise which have for their subject-matter the topics of material representations generally, and warranties in particular, as also the legal effect of a misrepresentation. For the legal effect of failure to furnish any information which the proposer will be taken to realise as affecting the risk which he asks his insurer to undertake, the reader is referred to the discussion of the rule of good faith which he will find in Chapter III of this treatise.<sup>2</sup>

**Conditions, including exceptions.**—Readers of the earlier chapters of this treatise will have realised that modern policies of insurance rarely, if *ever*, consist of but a few clauses in simple language. Indeed, the development of this special branch of the law of contract is marked

<sup>1</sup> For the topic of Competency, see Chapter II, pp. 19 *et seq.*, *ante*. For an exposition of the principles relating to Indemnity, Assignment, Subrogation and Contribution, see Chapter III, pp. 30 *et seq.*, *ante*. For the character of Insurance Policies generally, for the nature of Premium, and the effect of cover-notes, see *ibid.*, pp. 78 *et seq.*; and for canons of construction, see Chapter IV, pp. 131 *et seq.*, *ante*.

<sup>2</sup> Pages 89–91, *ante*.

by a tendency to fence the insurer's promises behind a considerable body of conditions, prominent among which are what are styled "exceptions". The object aimed at is precision in describing the risk to be covered. Thus in order to ascertain with any exactitude what it is for which the insurer undertakes to provide an indemnity, the so-called "operative" or "promissory" words must be read in conjunction with each and every "exception".

In the insurance world of today it is possible to insure against risk grounded in any form of dishonest dealing with property. But most of such risks need to be specially insured. Indeed, a general survey of modern insurance business reveals that what is an expressly excepted peril under one policy is the actual risk assumed under another. The most recent development is the possibility of taking out a policy "against loss from any cause whatsoever". Before, however, saying more of the last-mentioned type of insurance or of any other type of combined policy, a brief review may be offered of the commoner Exceptions in policies taken out to cover losses occasioned by dishonest dealings with property. The usual "excepted" risks may be thus grouped:—

(1) Risks by dishonest dealings consequent upon war or any like state of affairs.

(2) Predisposing influences such as riots or any other form of civil commotion.

(3) Risks which may be included in the perils commonly accepted in some other type of policy.

(4) Participation or connivance in the offence occasioning the loss on the part of the assured, his family, his servants, his tenants or of persons lawfully on his premises.

**Construction of policy.**—Now it has been said that the question whether a policy of insurance against loss of property by dishonest persons imports the technicalities of the criminal law in the matter of definition, is one of construction. In other words, it is to the wording of the policy itself that we must look for the answer. *Lake v. Simmons*, [1926] 1 K.B. 366, is a case of great interest in which, on construction, the policy was held to cover a dishonest taking such as the facts showed as having occasioned the loss, whether or not such taking would have amounted to larceny at Common Law, or larceny by a trick under the Larceny Act, 1916, or whether, again, the culprit would rather have been amenable to the law relating to obtaining goods by false pretences. *Lake v. Simmons* went to the House of Lords, and in that place, as well as during its passage there, a great deal was said as to how a commercial document such as a policy of insurance against risks to property,—particularly a contract of insurance against crimes such as burglary or theft,—ought to be read. It is to be collected from the views expressed on that subject that the words used to define the risks covered are not necessarily (*i.e.*, in every instance) to be read in the technical sense in which they are understood in the criminal law.<sup>1</sup> But, after all, the doctrine thus stated is the familiar one, long settled as a canon of construction in the law of contract, namely, that the Court will strive to give to the words used the meaning which it considers the parties to the contract intended those words to bear. Thus it is that, while it is true that words expressive of the risk to be covered may, in a particular context, be interpreted in a popular rather than a technical sense (*Equitable Trust Co. of New York v. Henderson*, [1930] 47 T.L.R. 90), it has been held that unless a contrary intention

<sup>1</sup> For a discussion of this case, see pp. 262-265, *ante*.

appears in the instrument (as in *Re George and Goldsmiths & General Burglary Insurance Association, Ltd.*, [1899] 1 Q.B. 595, where the operative words exhibiting the risk were "burglary and theft, as hereinafter defined") legal terms are to be given their strict legal meaning. (*Debenhams, Ltd. v. Excess Insurance Co., Ltd.*, [1912] 28 T.L.R. 505.) In *Re Calf & Sun Insurance Office*, [1920] 2 K.B. 366, C.A., the Court applied the technical distinctions of the criminal law as an aid to the interpretation of a policy covering risks by stealing where the policy was headed "burglary and house-breaking", but where the operative words proved not easy to construe. For the foregoing reasons the strict import of technical legal expressions where used cannot, as a matter of construction of the policy, be lightly brushed aside. Indeed, the importance of the matter will be even more evident when it is realised that, owing to the provisions of section 46 of the Insurance Act, 1938, a contract of insurance against burglary and kindred or cognate risks may have to be construed according to the law of India. The provisions of the section enable the holder of a policy of insurance issued by an insurer in respect of insurance business transacted in British India after 1st July, 1939, to have any question of law arising in connection with any such policy determined according to the law of British India.

In these circumstances it is evident that the question of what law is to be attracted by the particular instrument for the purposes of interpretation acquires an added importance. Assuming the holder of a policy to sue in India, the Court has no option but to deal with any matter of law "in connection with" the policy "according to the law in force in British India". A matter of interpretation is a matter of law arising in connection with the policy. And consequently, a policy once agitated in an Indian Court will have to be construed in accordance with the law of the land. It follows that foreign law, in the sense of foreign terms of art, may be attracted, as a matter of interpretation under the law of India, because our law of contract will apply any foreign law, where the parties, either expressly or by necessary implication, have agreed to be bound by it. But such foreign law has to be proved as a fact.

In the *mofussil*, i.e., the countryside of India, available law libraries are never to be found on such a scale as is possible in the Presidency Towns. It may be said that even for the most ordinary purposes of administering every-day justice, district and subordinate judges are literally starved of books. It would be difficult to find any such judge who took in the reports of the King's Bench Division or the reports of cases tried by the Court of Criminal Appeal. If he did, he would do so entirely at his own expense. There being no need hitherto to keep abreast of the law of crime in England, the leading English text-books upon the subject are very rarely to be met with; and hardly, if ever, in a current edition. It would seem, therefore, that for insurance cases instituted in other than the three Presidency High Courts, the only way of establishing the foreign law in accordance with the dictates of the Indian Evidence Act would be by obtaining expert opinion from an agreed practitioner of repute in that branch of law in England, and putting the same upon affidavit sworn by the expert himself.

In these circumstances it cannot be other than unfortunate if insurers in British India issue policies wherein the risk to be covered is expressed by direct reference to English or some other foreign legal term of art, without any further explanatory matter. Indeed it would seem to be but the path of wisdom to pursue quite other methods. And if it be proposed to make use of technical terms as describing the crimes envisaged

by the policy, it is suggested that the references should be to the Indian Penal Code. For, as we shall see hereafter, the attempts of commercial gentlemen and commercial lawyers to avoid the technicalities of the criminal law by the use of more general or supposedly popular terms have, in several instances, conspicuously failed to achieve clarity, and have consequently led to a deal of expensive litigation.

In what follows an attempt will be made to indicate the several offences under the law of England and of India respectively, which would seem to represent the real risks which it is the aim of an ordinary policy to cover.

To summarise what is submitted to be the effect of the law relating to insurance as modified by section 46 of the Insurance Act, 1938, so far as concerns the construction of the relative instrument:—

(1) If the policy be issued by an English insurer, the holder thereof (if it be in respect of insurance business transacted in British India after the statute referred to shall have come into force) has the option of suing in England or in India.

It is not necessary in this treatise to discuss further how the policy will be construed upon action brought in England. It will be sufficient to say that the canons of construction hereinbefore outlined will be applied.

(2) If the holder of such a policy elects to sue upon it in British India, the same canons of construction will be applied.

For example, if the words used plainly attract the definitions current in the English law of crime, that law will have to be proved, and looked to as an aid to construction; on the other hand if the legal terminology made use of as plainly attracts the law of crime as set forth in the Indian Penal Code, it is that Code which would be looked to for a like purpose.

(3) If the terminology be popular, rather than strictly technical, the Court will not consider itself trammelled by the niceties of the criminal law either of England or of India, but will set itself the task of determining, upon the basis of the words having their more ordinary meaning, what sense the parties intended the phraseology to bear.

(4) If the policy be issued by a purely Indian undertaking the same canons of construction appear to be applicable.

For example, if the parties to a policy so originating, choose to make use of terminology known only to the English law of crime, they cannot complain if the Court reads the document as meaning that they envisaged events of which that law would take cognisance, and the English definitions of which would meet their purposes.

On the other hand a reasonably plain indication that they meant no such thing would be respected, and the law of England would be unattracted as an aid to construction.

It becomes necessary, therefore, to look at these several crimes rather more closely, though the scale of this treatise renders it impossible to do more than reproduce the English and Indian statutory definitions, with but a brief introduction.

**Combined policies.**—Commercial opportunity has not been neglected in India in the matter of accepting business whose object it is to obtain cover for many different risks by means of one policy. Thus not only is it possible now-a-days to cover losses occasioned by every known form of dishonest dealing with property, but losses occasioned by negligence can be covered with equal ease. It may indeed be said that between the policy covering an extremely limited risk and one which

purports to cover losses however caused (known as an "all-risks" policy) almost every conceivable combination may be covered by the payment of a sufficient premium and the framing of an appropriate instrument.

### 3. *Onus.*

Where a policy of insurance becomes the subject-matter of a claim at law on the part of the assured, the burden is cast upon the latter of establishing that the loss in respect of which he claims has been proximately, and not remotely, occasioned by one of the perils insured against (*A.B. v. Northern Accident Insurance Co.*, [1896] 24 R. (Ct. of Sess.) 258); while upon the insurer is cast the burden (if he so pleads) of showing either that the policy is void; is no longer subsisting; or is to be forfeited by reason of some state of facts on which the insurer relies; or that the events on which the assured relies are outside the perils accepted by the policy. Thus, if the insurer sets up such defences as fraud, breach of warranty, breach of a condition precedent, or one of the exceptions as relieving him from liability, the *onus* (unless the policy otherwise provides) is entirely on him. (*Re Coleman's Depositories, Ltd.*, etc., [1907] 2 K.B. 798. C.A.)

To discharge the burden of proof, a plaintiff has but, in the first instance, to establish a *prima facie* case; when, if the defendant fails to destroy the case so made against him, the plaintiff must succeed in the action. In England the degree to which the notion of probability can gain in intensity so as to amount for all practical purposes to a certainty, has been the subject of many careful judicial pronouncements. But in England there is no codified law of evidence. It is otherwise in India, where the topic of "proof" is expressly dealt with in the Indian Evidence Act (I of 1872) whereof the relevant enactment is in these words:—

"3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

A fact is said not to be proved when it is neither proved nor disproved."

In an earlier chapter<sup>1</sup> it has been pointed out with reference to contracts of insurance that the incidence of these burdens of proof may sometimes work hardship, and, in a contest upon the policy, may prove rather an impediment than an aid to justice being done. For which reason many modern contracts of insurance contain stipulations whereby the *onus* of proving certain material facts is cast upon the assured where, but for such stipulations, the burden would not necessarily have been cast upon him under the general law. In many cases, however, as the

<sup>1</sup> Chapter V, at pp. 284-286, *ante*.

discussion alluded to shows, the contract by such stipulations does little more than apply the well-known principle that where a state of facts may reasonably be supposed to be peculiarly within the knowledge of a party to the litigation, the law will require him, rather than his adversary, to establish such facts, if they be material to the case he is seeking to make.

#### 4. *Dishonesty.*

**Preliminary.**—Historically, it was but natural that insurance against loss by stealing should have begun with burglary, since it may be conceded that, in general, portable property is less well guarded at night than by day: and it is the essence of the crime of burglary, properly so-called, that the thieving should be accomplished during the hours of darkness. Insurance policies, though styled Burglary policies, are in practice but rarely limited to providing indemnities against loss so occasioned.

The crime of burglary is unknown *eo nomine* to the law of India. There is, however, as we shall see hereafter, a more or less kindred crime punishable under the Indian Penal Code. At the outset the reader may be reminded that the branch of the law relating to crime is essentially more technical than is any other. The reason is not far to seek. In other branches of law those rules of conduct which are made subject to legal sanctions are not such as to imperil the ordinary liberties of the citizen. It is for this reason that by the law of England, as also of India, a man is presumed innocent of the crime with which he is charged till he be proved guilty of the same. It is said, therefore, correctly enough, that a charge of crime must be proved "up to the hilt".<sup>1</sup> The law is seen as the jealous guardian of man's liberties; and courts administering the criminal law are astute to see that the essential ingredients of the offence charged are clearly discernible in the facts established. It is for these reasons that the judges of the past, from whose lips the principles of the Common Law of crime have emanated, strove religiously to expound that law in clear language, so that all might know in what circumstance or set of circumstances a man's life or liberty might be imperilled as a breaker of the King's Peace.

As legislative enactment developed and in large measure began to replace the Common Law crimes by crimes under some statute, an equal precision was sought by the draughtsmen. And the courts with, if anything, an added zeal, pursued a policy of insisting upon the necessity of the facts disclosing an offence within the meaning of the provision laid in the indictment, before they would allow a verdict of guilty to be recorded. In jury trials under the law of crime in England as in India, all questions of law are matters for the judge to rule upon; and judges have not scrupled, in protection of the accused, to withdraw from the jury altogether the consideration of a case in which the evidence established does not, in their opinion, bring the prisoner within the mischief of the statute relied upon, or (in England) within the mischief of the particular crime at Common Law which is charged in the indictment. It is, indeed, well settled that the question whether there is evidence to go to the jury at all is itself a question of law, and therefore one for the judge alone to decide. For the foregoing reasons the law of crime, as the same has been evolved in England, is in very

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<sup>1</sup> This metaphor is discussed at p. 285 (note 2), *ante*.

great measure what is called case, or judge-made, law : that is to say it is to be collected from a long chain of judicial pronouncements handed down from what is now almost to be regarded as the remote past ; while to such expositions of the Common Law we have now to add the series of judicial interpretations of the statute law of crime. Such, then, are the sources of our knowledge of what goes to make up the criminal law of England.

**Burglary and house-breaking in the law of England.**—At Common Law the crime of burglary is essentially an offence which can only be committed at night. According to the books this was not always so ; but by the time of Edward VI it was already regarded as the better opinion that the crime of house-breaking by day was no burglary. By the early part of the 17th century at any rate the crime was regarded as not necessarily connected with stealing.<sup>1</sup> The essential ingredients at Common Law are (a) a breaking and entering of a dwelling-house or church, (b) with intent to commit a felony therein, and (c) the breaking and entering must both take place during the hours of darkness, though not necessarily during one and the same night.

The range of crimes amounting to felony at Common Law is a long one. There is no classification of crimes in India either as felonies or misdemeanours. But the distinction is of importance in England, inasmuch as the breaking and entering of a house or church with intent to commit a misdemeanour would not be burglary at Common Law. Among the large class of crimes in England included in the notion of felony those connected with stealing are numerous in themselves. No practical purpose would be served here by listing them, since the classification is based on the value or aggregate value of the thing or things stolen, and that value is so low that everything worth insuring by a policy covering a risk of burglary would, in fact, be covered.

By the terms of the Larceny Act, 1916,<sup>2</sup> the acts deemed felonious within the meaning of that act are set forth ; and the statute in effect slightly extends the ambit of the law against burglary. Moreover, those buildings by breaking and entering which it is possible to commit a special crime under the statute, include chapels, meeting-houses, schools, shops, warehouses, counting-houses,<sup>3</sup> offices, stores, garages, pavilions,<sup>4</sup> factories, workshops, and all public or municipal buildings. This statute re-enacts the provisions of the Larceny Act, 1861, whereby the element of time within which the crime of burglary can be committed is expressed as between 9 P.M. in the night and 6 A.M. on the following morning.

<sup>1</sup> There is at least some ground for supposing that in origin stealing was the kind of crime designated by the use of the word ; for the same has been derived partly from the Germanic word "*burg*" meaning a township, latinised as "*burgi*" when coupled to the late Latin word "*latrocinium*", thus making an expression conveying the idea of stealing in a town. The Oxford Dictionary resuscitates the old continental word "*burglarie*", and the Anglo-Latin "*burgaria*" and "*burgeris*", but regards the intrusive "*i*" as not to be explained.

<sup>2</sup> 6 & 7 Geo. V, c. 50, sec. 26.

<sup>3</sup> This is the old word for a place of business, or part of a place of business, where money is counted, i.e., where a customer's money is received or made over to him. It thus includes the ordinary business premises of a joint-stock bank or of a private banker or money-lender.

<sup>4</sup> Used in this context mostly of buildings erected as part of the local amenities of a pleasure resort, such as a public bathing-place, of buildings erected upon piers at sea-side townships, or in any public pleasure garden. Race-courses, cricket and football fields, and such centres of games and sports as golf links and polo grounds, are often furnished with buildings to be classified as pavilions.

By the Larceny Act, 1916, the definition of burglary is thus extended:—

"25. Every person who in the night—(1) breaks and enters the dwelling-house of another with intent to commit any felony therein; or (2) breaks out of the dwelling-house of another, having—(a) entered the said dwelling-house with intent to commit any felony therein; or (b) committed any felony in the said dwelling-house: shall be guilty of felony called burglary....."

**House-breaking.**—Included in the English law of crime is the specific crime of house-breaking, which is now-a-days a statutory offence created by section 26 of the Larceny Act. By this, the latest form of larceny legislation in England, the only difference between the crime of burglary and that of house-breaking is that the former can only be committed between the hours of darkness specified in the statute. As the English conception of what amounts to house-breaking as the same was understood in the first part of the last century was utilised by the draughtsmen of the Indian Penal Code, it may be useful to the student to say something of the meaning of the word "breaking" as used by English lawyers in this particular context.

The English Common Law was and is a great respecter of property. The Englishman is notorious for his desire to preserve the individuality and the privacy of his home and the sanctity of his belongings. The popular phrase "an Englishman's home is his castle" is grounded in the notion, not inconsistent with the facts, that the law has provided for the humblest proprietor of land a fortification as strong and as well guarded as the genius of the military engineer had devised for the residence of the noble. The boundary of a man's land was and is considered his "close".<sup>1</sup> To pass that boundary without the leave, license or constructive invitation of the owner of the close was, in the language of old time lawyers, a "breaking" of it, and as such gave ground for an action at law.<sup>2</sup> The ownership of the land was conceived as carrying with it the absolute dominion over the air space above it *usque ad coelum*<sup>3</sup> (up to the heavens); while by "land" was to be understood the earth beneath the owner's feet and (to the extent of his lateral boundaries) calculated in imagination *usque ad inferos* (to the depths below). After the world came to be regarded as globular in form, this meant to the centre of the earth. The word "break" means no more than to make a breach in, and the fiction is that if you have not physically broken down a man's boundary to get in, you have in effect as badly invaded his rights by pushing open or climbing his gate, or even by leaping over his fence. To break, then, into a man's place of residence was an even greater invasion of his right to privacy and exclusive user of what is his, than merely to cross his field, enter his park or visit (uninvited) his garden. One who so conducts himself with a view to the commission of a felony (a grave offence against the King's Peace) must be regarded as, in so doing, committing a further act against that peace. It was thus both an invasion of a private right,—and so fit cause for an action of trespass,—and also a wrong done to the commonwealth; for it was "against the Peace of our Lord the King

<sup>1</sup> The word today is commonly reserved for the land and buildings appurtenant to a cathedral church.

<sup>2</sup> The action was one of Trespass, *quare clausum fregit* ("because he has broken the close").

<sup>3</sup> See, as to the early cases in which trespass into this air space was considered, p. 328, *post*.

his Crown and Dignity",<sup>1</sup> and it was the King's Peace which guaranteed security to his subjects.

**Breaking.**—The following have been held to be actual "breakings" within the meaning of the law relating to house-breaking or burglary in England: making a hole in a wall; forcing a door open, putting it back, picking, or opening, its lock with a false key; breaking a window, taking out part of the glass of a window, putting back the leaf of a window, with an instrument; drawing or lifting the latch of a door or gate, the door or gate not being otherwise fastened; turning a key which has locked the door from the inside; undoing any other fastening which the owner of the premises has provided; getting down a chimney. (This latter on the ground that the house was as much closed as the nature of things would permit.) In *R. v. Brice*, [1821] Russ. & Ry. 450, the prisoner had got down a chimney but was caught before he had actually reached the floor of one of the rooms by means of the fire-place. The judges, with two dissentients, held this a "breaking and entering": getting in at the top of the chimney on the roof was a "breaking" of the dwelling-house, and the lowering himself down the chimney was an "entry" within it.

In *R. v. Lewis*, [1827] 2 C. & P. 628, the prisoner had made his way through an existing aperture in a cellar window. He had not enlarged the aperture. This was held not a sufficient breaking. So also in *R. v. Spriggs & Hancock*, [1834] 1 Mood. & R. 357, it was said that "if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequence. The entry through such an opening is not a breaking."

It is, however, within the mischief of the relative law of England if the breaking be by means of an inner door, after the offender has entered through some other part of the house or through an outer door which he has found open. In the time of Chief Justice Hale the judges were divided on the question whether a breaking open of the door of a cupboard let into a wall was, with the other surrounding circumstances, such a "breaking" as would render the prisoner liable to be convicted of burglary. The Chief Justice himself was among those who thought that it was.

In the law of England, however, it is not necessary that the requisite "breaking" should be actual. It may be constructive. So to contrive that an owner or occupier be led to open a door or a window, whereby entrance is effected, because of threats or a fraudulent trick, or by means of a conspiracy, is a sufficient "breaking" to bring the offenders within the arm of the law.

What is conduct sufficient to constitute a "breaking in" will equally suffice for a "breaking out" within the meaning of the Larceny Act.

**Entry.**—The law of England is equally technical upon the topic of "entry". After a period of uncertainty in relation to this matter, it may now be regarded as settled that the intrusion of any part of the body, *e.g.*, the hand or foot, or the intrusion of any instrument or weapon introduced for the purpose of committing a felony, constitutes a sufficient "entry". The instrument need not be inanimate: for it was long ago decided that if a man of full age break a house and put in a child below seven or eight years old, who takes goods out and delivers them to the man who then carries them away, the man has been guilty of house-breaking and, if at night, of burglary, though the child who made the entry cannot himself be guilty by reason of his infancy.

<sup>1</sup> Thus the concluding portion of the old indictments at Common Law.

**Dwelling-house.**—Many nice questions are involved in the notion of a dwelling-house, as the same is understood in the law relating to house-breaking and burglary. To constitute a dwelling-house it is sufficient if the premises be in fact lived in, though only in part, and that part accessible at least by a covered passage. It is not necessary that the premises be actually inhabited at the time of the offence. But there must have been a taking over of possession by someone who, though away at the moment, means to return. Lodging accommodation over a stable has been held a dwelling-house. Sets of chambers in a college or in an Inn of Court are regarded as separate dwelling-houses; and a permanent building of brick and mud, regularly but not permanently occupied for the purposes of a fair for a few days in each year, and which had doors and windows capable of being fastened, was held a dwelling-house within the meaning of the law relating to burglary. (*R. v. Smith*, [1833] 1 Mood. & R. 256.)

Breaking into a booth or tent cannot be burglary because of the impermanent nature of such structures.

**Analogous law in India.**—The framers of the Indian Penal Code had before them all the difficulties and technicalities of the law of England relating to house-breaking and burglary. They strove to avoid them, and, in large measure, were remarkably successful. The plan they adopted has as its basic conception the creation of a specific crime styled by them "Criminal Trespass". Out of this all the other specific crimes dealt with between sections 442 and 460 of the Code have been evolved.

A trespass is criminal, as distinguished from one which gives rise to no more than a right to damages against the trespasser, when the latter has either entered into or upon property with intention to commit an offence or to intimidate, insult or annoy the person in possession of it; or when, having come there lawfully, he remains with a like intention. When the property so entered upon is a building, tent or vessel used as a human dwelling-place, or for the custody of property, or is a place of worship, the wrongful act is designated "house-trespass". When an entrance with any of the aforesaid intentions has been made clandestinely, the offence is styled "lurking house-trespass". Conduct of this character between the hours of sunset and sunrise is "lurking house-trespass by night".<sup>1</sup>

If it be intended to provide insurance against risks arising out of conduct falling within the mischief of any of the foregoing statutory definitions, it is suggested as good sense that the risk so covered should be defined in the policy either in terms of the appropriate section, or so as plainly to attract it.

**Larceny in the law of England.**—It is common in England to find in a policy styled a "burglary policy" protection also offered against loss by Larceny or Theft or both. Larceny is a technical offence. Theft has no technical meaning in the English law of crime. It has been held that in its popular sense the word "theft" is a mere equivalent for larceny. (*Pawle & Co. v. Bussell*, [1916] 114 L.T. 805, 807.) Therefore, in an English policy purporting to include "larceny" the addition of the word "theft" adds nothing to the nature of the protection undertaken.

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<sup>1</sup> For the relative penal sections the reader is referred to the text of the Indian Penal Code (Act XLV of 1860) in Butterworth's Encyclopædia of the General Acts & Codes of India, Vol. II, at pp. 34 *et seq.*

It is, however, necessary for the purposes of this present chapter to state that where the peril insured against is set out in the technical language of the criminal law, the loss must be shown to have been occasioned by the commission of the crime so stated, and anything less than, or different from, the technical offence so attracted, will not support a claim under the policy. Thus, if larceny be the word used to express the risk covered, a loss by any form of dishonesty outside the law of larceny will not be covered. The essence of larceny is an actual or constructive "taking" followed by a "carrying away"; yet although the property be so dealt with that the offender would be within the mischief of the statute, a recovery of the property will disentitle the assured to claim. For the risk covered is not an illegal, or even a criminal, handling of property, but the assured's loss of it. (*Saqui & Lawrence v. Stearns*, [1911] 1 K.B. 426, 435 (C.A.))

**Theft in the law of India.**—As already observed, the framers of the Indian Penal Code have chosen to make of the word "theft" what lawyers call a "term of art". The offence is so technical that only a man who brings himself within the words of the relative section (which is section 378) is a thief. Thus a man may steal his own property; the essential ingredient of the offence being the dishonest intention which lies behind the movement imparted to the property.

In the preceding chapter of this treatise the reader will find the distinction between the various offences included in the term "larceny" in England, and the highly technical offence of "theft" under the Indian Penal Code, discussed.<sup>1</sup> The scale of this work precludes a repetition of that discussion here.

**Robbery in English and Indian law.**—Robbery at Common Law is an aggravated species of larceny, and has been defined as the felonious taking of money or goods of any value from the person of another, or in his presence, against his will by violence or by putting him in fear. Thus it is sufficient if the fear induced so operates as to prevent the victim from interfering or seeking help while the offender takes and carries away the property. It is, however, essential that the violence used or the fear induced should itself precede the taking. To that extent the offence is technical and a violent *defence* of goods already taken by an offender would not constitute robbery at Common Law. Under section 23 (1) of the Larceny Act, 1916, it is made felony to go armed with any offensive weapon or instrument . . . . . and being so armed to rob any person and, at the time of or immediately before, or immediately after such robbery, to use any personal violence to any person.

Robbery is a specific offence in India under section 390 of the Penal Code where it is thus defined:—

"390. In all robbery there is either theft or extortion."

"Theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint."

<sup>1</sup> See pp. 252-256, *ante*, where also the relative sections of the English Larceny Act and of the Indian Penal Code are set out. For a further discussion of the degree to which technical distinctions of the criminal law may affect the construction of a policy, see pp. 293-295, *ante*.

“**Extortion** is ‘robbery’ if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.”

“*Explanation.*—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.”

**Dacoity.**—The same Code creates a specialised form of robbery, namely, by a gang of five or more persons, which is styled “Dacoity”. The word is of east Indian origin, and was already in use in the Bengal and Madras Regulations, but not in the Bombay Regulations, which the Law Commissioners had before them as an aid to the framing of the original Penal Code. In the west of the peninsula the crime had been styled “gang robbery”, and the number of persons acting in concert, which was sufficient to bring them within the then existing Regulations, was four. The offence of Dacoity is defined in section 391 of the present Code in these words:—

“391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit ‘dacoity’.”

In order to contrast the specific offences in the English law of crime mentioned above with the analogous law in India, one may cite the facts in *Simpson's Case* (2 East P.C. c. 16, s. 131). There the leader of a considerable band of rioters, said to be as many as seventy in number, surrounded the prosecutor's house and threatened to destroy it if he did not part with a golden guinea. The prosecutor temporised by parting with a five-shilling piece, but, under added coercion, parted with an additional five shillings. The rioters then entered his house, breached a cask of cider, and ate and drank at their pleasure and his expense, afterwards carrying away a piece of cheese. They were all convicted of “robbery in a dwelling-house”. It would be otherwise in India, where, under the Code, they could only have been convicted of the separate offences of rioting and theft.

**Blackmail and extortion.**—The various methods of extorting money by threats of putting the law in motion against the victim in respect of some alleged offence on his part—conduct by the extortioner which commonly goes by the name of “blackmail”—is robbery at Common Law. In India the last-named crime would be simple “Extortion”. That offence is defined in section 383 of the Indian Penal Code. There the definition is thus set forth:—

“383. Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits ‘extortion’.”

It is said that the word “injury” in the foregoing section is wide enough to include the effect of an arrest as part of a prosecution for crime; and, consequently, that to threaten anyone with a prosecution as a means of inducing him to part with money is to place that person in fear of such

an "injury". This coupled with the intention to make the victim part with something which he would not otherwise do, implies "dishonesty" in the extortioner, and thus brings the latter finally within the mischief of the section.

**Cheating.**—The Indian criminal law comprehends in the technical offence of "cheating", a good deal of which, in the law of England, would be variously described as "obtaining money or goods by false pretences", "larceny by a trick", etc. The relative section of the Penal Code thus defines the offence in India:—

"415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'."

*Explanation.*—A dishonest concealment of facts is a deception within the meaning of this section."

**Embezzlement, Criminal misappropriation and Criminal breach of trust.**—The crime of embezzlement in England is one of the most technical of all offences known to the existing law of crime in that country. The gist of it is a fraudulent misappropriation of money or securities or conversion to his own use on the part of a clerk or servant. In England dishonest dealing with property, if it be outside the law of embezzlement, must be brought within the law of larceny or it will be no crime at all. In India a dishonest usage of the property of another must fall within the law either of theft (in a simple, or aggravated form such as robbery or extortion) or must be within the notion of criminal misappropriation, criminal breach of trust, or within the definition of cheating. The subjects of misappropriation and criminal breach of trust are dealt with in sections 403 and 405, respectively, of the Indian Penal Code. The latter section is thus worded:—

"405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

For a discussion of the technicalities with which the offences of cheating, criminal misappropriation and criminal breach of trust as defined in the Penal Code are invested, see the case of *Emperor v. John McIver*, [1936] 37 Cr. L.J. 637, and the present author's commentary thereon in the next preceding chapter of this treatise.<sup>1</sup>

**Non-technical definitions.**—The parties to a contract of insurance against loss by dishonest practices, are not bound to tie themselves to any technical term of art in the relative law of crime. They may, if they choose, adopt a non-technical meaning for any word which happens to have a technical meaning; but, then, they must say plainly what is

<sup>1</sup> See pp. 262-265, *ante*.

to be understood as the meaning of the word or words they employ as descriptive of the peril insured against. And if they thus elect to give a special non-technical meaning to such words, they will be held bound by their own definitions. Consequently, if it turn out that the non-technical definition they have thus chosen to employ covers less than the technical meaning of the word would have done, they cannot have resort to the protection of a technical interpretation. The classical case of *In re George and Goldsmiths and General Burglary Insurance Association, Ltd.*, [1899] 1 Q.B. 595, C.A., establishes the foregoing propositions. In that case the material facts were as follows:—

The policy recited that one George was desirous of effecting with the company “an insurance against loss or damage by burglary and house-breaking as hereinafter defined”. The operative words in the policy read: “Now therefore this policy witnesseth that, if at any time after the date hereof, and during the continuance of this policy, the property above described, or any part thereof, shall be lost by theft following upon actual forcible and violent entry upon the premises, wherein the same is herein stated to be situate, then the association shall pay or make good to the assured such loss to the extent of the value of the property so lost, but not exceeding in the whole the sum or sums of money respectively insured thereon”. It appeared from the evidence that the outer door of the shop, though closed, was not bolted at the material time; so that all that was necessary for the purpose of gaining entrance was to turn the handle of the door. This was evidently the course which the thief had adopted, just at the hour in the morning when the shopkeeper's servant had removed the shutters and was taking them away to the rear of the premises. In that short space of time, some thief or thieves made their entrance. Once inside the shop thus unattended, they dislodged a bar which gave some protection to a stock of jewellery in a show-case and made off with the contents.

On a case stated for the opinion of a Divisional Court the judges thought that the loss was within the policy and allowed the assured to recover. They came to that conclusion by reading the two crimes specified in the recital, namely, burglary and house-breaking in their technical sense.

On appeal a strong court, consisting of Lord Russell of Killowen, C.J., and A. L. Smith and Collins, L.J.J., reversed that decision, holding the Divisional Court to have missed altogether the significance of the three words in the recital on which the lower court had relied, namely, the words “as hereinafter defined”. The gist of the decision was that the parties, by deliberately giving their own definition of the two words “burglary” and “house-breaking” in the operative part of the policy, must be taken to have been seeking to avoid the subtleties involved in the criminal law with regard to these two offences; that consequently they did not mean to use any word in its technical sense, but intended by the operative words “to cover an entry effected by real violence as distinguished from an entry effected by stealth without violence”. A. L. Smith, L.J., pointed out that the parties had studiously avoided any use of the word “breaking” in the operative portion, so as to make the risk as unlike the legal definition of “burglary” or “house-breaking” as it well could be made. He agreed with the Lord Chief Justice that it was impossible to regard the mere turning of a door handle as “actual forcible and violent entry”. Collins, L.J., in agreeing, put the matter thus: “They [the parties] have chosen to frame for themselves a definition of burglary and house-breaking for the purposes of their contract, and by that definition their rights in this case must be

determined. It is no part of our province to make for the parties a reasonable contract; and if, as I think, they have not altogether succeeded in doing so for themselves, we cannot do it for them. . . . . The construction does exclude cases within the legal definition of 'burglary' and 'house-breaking' which, I think, the parties, if they had had their eyes open, would probably have desired to include."

The last-named learned Lord Justice ended his judgment with a passage worth citing as showing the difficulty of attempting to amend the plain words of a contract on the ground that the parties might have intended to include some such case as the facts presented. "There is," said he, "another reason why it is impossible for me to speculate as to the intention of the parties, apart from the ordinary meaning of the words which they have used. I cannot tell how it would have affected the rate of premium, if they had really intended to cover such cases as the present. The contract, as at present framed, appears to me to be inadequate for the protection of the assured, and, probably, is a much more restrictive contract than he would have agreed to, if he had had his eyes open; but, how can I tell what effect it would have had on the terms of the contract, if the respondent had insisted on a larger protection?"

**Special risks arising from dishonesty.**—So far has the business of insurance advanced in modern times, that there is, in reality, no risk to property which cannot be covered by a policy of insurance. Bankers, stock-brokers, special types of warehousemen,<sup>1</sup> solicitors—anyone, indeed, whose partners, servants or agents are commonly called upon to deal with money, securities, or any other form of easily convertible property belonging to customers or clients—need, in the modern world, to be covered against loss of such property arising from any kind of dishonest conduct.

In a great many cases such as burglary, house-breaking, larceny, theft, etc., it is the character of the crime and not the perpetrator of it, which is material; while, too, the question where the crime took place may also be of the greatest importance. For the contract has to be performed where the property at risk is, and the liability is consequently inseparable from the particular premises named in the instrument. If the event relied upon as occasioning the loss takes place outside the premises described, the insurance may not attach. For the foregoing reasons, accuracy in description of the premises wherein the property at risk is located is of the utmost importance. This may be effected in a schedule, commonly forming part of the policy, or in the proposal form (where there is one) including in the latter a *questionnaire*, which is commonly addressed to the proposer. Where such documents have been utilised by the parties they are commonly attracted by the words of the policy subsequently issued.

In bankers', stock-brokers' or solicitors' policies where the property at risk may be money, securities or any other form of convertible moveable property, the cover offered may be for any of such property when in transit from one premises to another. For the reasons stated great care is required in describing the risk.

The circumstances surrounding the loss agitated in the case of *Pennsylvania Co. for Insurances on Lives, etc. v. Mumford*, [1920] 2 K.B.

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<sup>1</sup> I.e., Firms carrying on "Safe-deposit" business. Business of this kind has begun, but is in its infancy, in India.

537, afford good examples of how easy it is for experienced draughtsmen to fail in framing a policy which will cover all that the parties undoubtedly have in mind.

In that case the plaintiffs carried on business as what is called in America "a trust company", namely, as custodians of securities deposited with them for safe keeping. The company had for their protection in such matters a series of consecutive policies with Lloyd's (represented in the action by the defendant Mumford, as one of the underwriters): the liability on each policy being fixed primarily by the year in which the loss is discovered and not necessarily therefore by the year in which it happens. The particular policy in suit covered a period of 12 months from the 30th of September 1916, but offered indemnification against losses which might be discovered during that period, yet which, by the terms of the policy, were confined to those sustained after September 1909. The plaintiffs' business premises were situated in the city of Philadelphia. The losses to be covered were those sustained:—"1. *By reason of any bonds, debentures, scrip, certificates, warrants.....or other similar securities.....the custody of which they have undertaken, and which now are or are by them supposed or believed to be.....in or upon their premises....being while so in or upon such premises....made away with by...theft....embezzlement, burglary or abstraction...whether by the officers, clerks and servants of the assured or any other person.*" "2. *By reason of any securities of the description above specified being....stolen, misappropriated or made away with by.....fraud of their officers, clerks or servants.....whilst in transit.....between any houses or places within 100 miles from Philadelphia.*"

It appeared from the evidence that securities deposited by customers were kept in specially constructed strong-rooms or "vaults", the whole of which were in the custody of a special clerk, known as a "vault clerk". One of the plaintiffs' most trusted officers was W, their Secretary. Using his position as such, W, over a number of years, succeeded in making away with securities to the value of £140,000. His *modus operandi* was to obtain from the vault clerk the appropriate withdrawal card on which securities of an individual customer were listed and which showed the dates of deposit and withdrawal. When returning the relative cards he furnished forged documents purporting to indicate the receipt of the securities by the customers concerned: and from these the necessary entries were made in the plaintiffs' records. The questions for determination involved the construction of the phrases "*which now are or are by them supposed or believed to be in or upon their premises*" and "*stolen, misappropriated or made away with by fraud, etc., whilst in transit between any houses or places, etc.*"

As Scrutton, L.J., put it: "the nature of the fraud was not that the securities were fraudulently abstracted by the servant, while the company thought the goods remained on their premises, but that the servant by fraud and forgery induced the company to think that the goods were asked for by, and delivered to, the customer, and so left their possession, when in fact the servant never had a request from the customer for the securities, nor delivered them to the customer". Both the judge of first instance and the judges of the Court of Appeal held that there could be no bringing the event within the scope of clause 1, since the facts disclosed that there could be no belief on the part of the plaintiffs that the goods were upon their premises at the time of the conversion: all their information from their own servant being that the customers had received them.

The material date for the purpose of such knowledge was May of 1917, long before which the conversion of the property was complete.

In dealing with the contention that, at any rate, the goods were misappropriated whilst "*in transit*" between "*places*" within the meaning of clause 2, Scrutton, L.J., called attention to the other words defining the transit, namely, "*such risk or transit to commence on every security or parcel of securities from the moment of the person into whose hands the same may be delivered on behalf of the assured receiving the same and to continue until the delivery thereof at destination*". In discussing the true meaning to be attributed to the clause, read as a whole, the learned Lord Justice continued: "But for the latter words of this clause I should think that operations within the company's offices were not a transit: in my opinion, however, the latter words show that if there is a transit 'between houses or places' it may begin in the first house and end in the second. It is, however, a considerable step further to say that an operation both beginning and ending in the first 'house' is a transit between houses or places. Examples of this would be taking the securities from the safe to another room in the office for the auditors to examine them, and returning them to the safe; or taking them from the safe to give to a customer in the waiting-room in the company's office. Neither of these, in my view, would be a transit between 'houses or places'. I can understand that where an official takes securities from the safe in Philadelphia ostensibly to deliver them to a customer in Boston, there is a 'transit' from Philadelphia to Boston, and it begins when the official takes them from the safe—but there is in that case a transit between 'houses or places'. In the cases above put there is no 'transit between houses or places', and the plaintiff company is, in my opinion, in this further difficulty—that they must give evidence of a transit in which the goods were lost, and they prove nothing as to the actual or intended transit. It is quite consistent with the evidence that the thief said he wanted the securities to deliver to a customer in the waiting-room; it is quite possible he said nothing except to ask for a signature, but was trusted. Of what transit was intended there appears to me to be no evidence; no evidence also of what transit, if any, commenced. The thief walked away with the securities in his hand or his pocket. These reasons, which I have stated in my own words, lead me to concur in the result of Mr. Justice Roche's judgment on this point."

The same learned Lord Justice in a passage towards the end of his judgment (at p. 551) observed as follows: "with great respect to the eminent authorities at Lloyd's who are responsible for this common-form policy, if it means what their counsel contend it means, the sooner it is put into language intelligible to the ordinary assured the better. . . . so as to cover the losses which occurred in this case, which clearly should be within the scope of such a common form of policy".

Contrasted with insurances in which the particular premises is material and the originator of the loss need not be, are those which are intended to cover losses occasioned by the fraud or some other form of dishonesty to which a particular class of individual or a named individual might be tempted. Out of these risks has developed what is commercially known as Fidelity Guarantee business. The last type of insurance business, however, is highly specialised and will be dealt with more particularly hereafter.<sup>1</sup>

<sup>1</sup> See p. 355, *post*.

## 5. Negligence.

**Theories.**—The student, embarking upon a study of the English law of Negligence must be prepared to enter a maze from which he may find it peculiarly difficult to extricate himself. Turning this way and that he finds himself confronted now by "gross" negligence, now by "crass" negligence, then by "culpable" negligence and as frequently by "criminal" negligence: meeting all these much more often than "simple" negligence. As he turns here and there in the pursuit of these ideas he feels the legal concept of negligence *per se* to be perpetually eluding him. Determining to re-start his quest from some fixed point, easy to recollect, he comes across *Coggs v. Bernard*,<sup>1</sup> decided by Lord Holt more than two centuries ago. In that case the learned Chief Justice had set himself to classify bailments. It was in the course of so doing that he was heard to refer to negligence as being sometimes "gross" sometimes "ordinary" and sometimes "slight". A layman will perhaps see no harm in thus grading negligent conduct. But the fact remains that for the practising lawyer the trouble seems to have originated from these observations of Lord Holt. What is the difference between "slight" and "ordinary" negligence? Where is the line to be drawn between "ordinary" and "gross" negligence? When, above all, does liability *criminaliter* or *civiliter* begin?

The 19th century was not far advanced before a Baron of the Court of Exchequer protested that he saw "no difference between negligence and gross negligence"; for him "it was the same thing with a vituperative epithet". (*Wilson v. Brett*, [1843] 11 M. & W. 113.) Another learned Baron—Bramwell, B., in *Degg v. Midland Railway Co.*, [1857] 1 H. & N. 773, 781—declared his opinion to be that "there is no absolute or intrinsic negligence; it is always relative to some circumstance of time, place or person". Does Bowen, L.J., in *Thomas v. Quartermaine*, [1887] 18 Q.B.D. 685, 694, make it any easier for students when he says "negligence is simply neglect of some care which we are bound by law to exercise towards somebody"? For what, we ask, is the degree of care which the law insists upon? The need of supplying a plain answer to this question had already struck Montague Smith, J., who thought it "more correct and scientific to define the degrees of care than the degrees of negligence", but, alas, a Lord Chancellor had declared himself to be of a different opinion. "The epithet 'gross'" observed Lord Chelmsford in *Giblin v. McMullen*, [1869] L.R. 2 P.C. 317, 337 "is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility."

Viewing the affair in a perspective made the easier by distance a great American jurist<sup>2</sup> thus sums up the position as he saw it in his day: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the

<sup>1</sup> [1703] 1 Smith's Leading Cases, 14th Ed., p. 173.

<sup>2</sup> Storey.

common law from some of the commentators of the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influences the Courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation."

At this point the perplexed student may be inclined to comfort himself with words attributed to Baron Huddleston: "There is no such thing as being right in law. The House of Lords are only right because there is no Court above them to overrule them"; while the unprofessional reader may feel inclined to say with a certain local heroine who distinguished herself in one of the University towns of England during Wat Tyler's rebellion "Away with the learning of the clerks!". It is, however, not so desperate a case after all, for we shall see that between the layman and the clerk there is to be found, in these later days, no small measure of agreement. It so happens that while the practitioners of the past may be thought to have developed little or nothing towards a definition of actionable negligence which does not melt at the first touch, the modern professors have come forward to save the situation. A Cambridge scholar of great distinction<sup>1</sup> thus defines actionable negligence:—

"Negligence in the law of torts<sup>2</sup> has a double meaning—it may signify (i) a definite tort, which consists of breach of legal duty to advert to the circumstances or the consequences (or both) of an act or omission which causes damage to another; the standard of this legal duty is that of a reasonable man, so far as advertence to the circumstances of the act or omission is concerned, and that of directness with respect to the consequences; (ii) merely inadvertence to a legal duty, which inadvertence is a possible mental element in the commission of some other (but by no means all) torts."

It is suggested that the foregoing definition should prove on the whole acceptable to the general reader. He ought not surely to be other than grateful for the introduction it affords him to the Reasonable Man—if he has not already met that useful personage elsewhere. Thus the professors help towards a *modus vivendi*, whereby the clerk and the layman can agree in large measure to sink their differences. They can now always appeal to the Reasonable Man. They already agree that a negligent act may be a sin as well of commission as of omission. In discussing negligence they will now as certainly agree that from whatever angle of vision the conduct complained of may be viewed it stands out as representative of *failure*—failure to attain to some standard of prudence which is conceived as pointing the way, at the material time, to a certain course of conduct.<sup>3</sup>

<sup>1</sup> Dr. Winfield (Rouse-Ball Professor of English Law) in the *Law Quarterly Review*, Vol. 42, p. 196. The definition commends itself to Dr. Potter, Dean of the Faculty of Laws at Kings College, London, as he himself says in his contribution to *Clerk & Lindwell on Torts*, 9th Ed., 1937.

<sup>2</sup> Negligence is now-a-days itself to be classed as an actionable wrong—what lawyers call a "tort".

<sup>3</sup> We owe to Mr. A. P. Herbert, whose imaginative genius has given us already some four volumes of so-called *Misleading Cases in the Common Law*, the only description of the Reasonable Man to be found in the books! He puts it into the mouth of Lord Justice Mallow who, when delivering judgment in the

For the purposes of construing a policy of insurance designed to cover claims in respect of alleged negligence the way would seem then fairly clear of some, at any rate, of those alarming differences of opinion which in actions of tort or in criminal prosecution have created such obstacles to the attainment of justice. Contracts of insurance are commercial documents, and are now-a-days to be interpreted as commercial men would interpret them. In other words commercial men are not, unless plain language compels the court so to hold, to be supposed to mean by negligence what a trained lawyer has in his mind when drawing a statement of claim or defence in an action of tort. The neglect of a watchman when on duty as such, neglect by a solicitor, when in charge of particular business for his client, will be tested—artificially it is true—by means of the ordinary fairly sensitive man's power of imagination, guided, on contest, by a certain amount of technical advice in the shape of evidence. Modern English case-law does not seem to warrant the belief that the artificial standard thus set is divorced from the facts of everyday experience, nor does a perusal of modern Indian case-law lead to any different conclusion.

A recent case (*Haseldine v. Hosken*, [1933] 3 Comp. Cas. (Insurance) 170), arising out of a policy of insurance to indemnify a solicitor against claims made upon him in respect of any alleged professional neglect or error, illustrates a course of conduct which does not fall within the category of negligence as contemplated by such a policy. The same case illustrates the doctrine, several times alluded to earlier in this treatise, that illegal contracts are unenforceable.<sup>1</sup>

The material facts were that the plaintiff, a solicitor, had been retained by a client overseas to enforce that client's claim against a firm in England in respect of alleged commission. First with his client's agent, and later with the client himself, the solicitor entered into two agreements the effect of which was tersely expressed by Scrutton, L.J., as follows: "I, Haseldine, will carry on this action without charge to you, on the terms that I shall get a percentage on the amount recovered, and the action must not be settled without my consent". The first agreement was in November, 1928, when the rate of remuneration was to be 20%. The second agreement was made in February, 1930, whereby

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mythical cause of *Fardell v. Potts*, expresses himself thus: "The Reasonable Man . . . . . is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; who neither star-gazes nor is lost in meditation when approaching trap-doors or the margin of a dock; who records in every case upon the counterfoils of cheques such ample details as are desirable, scrupulously substitutes the word 'Order' for the word 'Bearer', crosses the instrument 'a/o Payee only', and registers the package in which it is dispatched; who never mounts a moving omnibus, and does not alight from any car while the train is in motion; who investigates exhaustively the *bona fides* of every mendicant before distributing alms, and will inform himself of the history and habits of a dog before administering a caress; who believes no gossip, nor repeats it, without firm basis for believing it to be true; who never drives his ball till those in front of him have definitely vacated the putting-green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbours, his servants, his ox or his ass; who in the way of his business looks only for that narrow margin of profit which twelve men such as himself would reckon to be 'fair', and contemplates his fellow-merchants, their agents, and their goods, with that degree of suspicion and distrust which the law deems admirable; who never swears, gambles, or loses his temper; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean." (*Misleading Cases*, London, Methuen & Co., 8th Ed., pp. 10, 11.)

<sup>1</sup> See pp. 26-29, *ante*.

the rate was raised to 40%. Just <sup>one</sup> month earlier the solicitor had taken out a policy insuring himself against losses arising from claims made against him "by reason of any neglect, omission, or error alleged to have been committed on the part of the firm or their predecessors in business in their professional capacity as solicitors". The speculative action which was to be aided by these two agreements failed. The successful defendant, unable to get more than a fraction of its costs against the nominal plaintiff (Mr. Haseldine's client), and coming somehow to hear of the said two private agreements between the plaintiff and his solicitor, proceeded to bring an action against Mr. Haseldine for damages. The form of action brought is not stated in the reports; but Haseldine settled the claim for £950, and then had resort to the insurers for an indemnity under the policy. Before Swift, J., he was successful, partly, it seems, because the learned Judge believed the learned solicitor when the latter said in the witness box "I knew nothing about Champerty: I knew nothing about the Solicitor's Act: I had no idea that it was a criminal offence or illegal to prosecute an action at my own expense on the terms that I should get a share of the amount recovered".

On appeal, however, Scrutton, Greer and Slesser, L.JJ., unanimously reversed the decision of the Court below: holding, firstly, that the loss sustained was not within the policy, since it had not been occasioned by any "neglect, omission or error" while the plaintiff was acting in his professional capacity; secondly, that the loss arose out of the conduct of an action in which Haseldine had brought himself within the mischief of the law against Champerty and Maintenance; and, consequently, even assuming that not to know he was acting contrary to law constituted a professional "error" as a solicitor within the risks covered by the policy, the agreements themselves being illegal and offending both the Common Law of Champerty as well as Section 11 of the Attorneys and Solicitors Act 1870,<sup>1</sup> the Court would not allow a plaintiff so situated to recover anything under such a policy. In the course of his judgment Scrutton, L.J., permitted himself to observe in the words of Kennedy, J. (in *Burrows v. Rhodes*, [1899] 1 Q.B. 816, at p. 829), "a man is presumed to know the law". In both instances the remark may be regarded as *obiter*. Anyhow, it was long ago asserted that there is no such presumption. The maxim is *ignorantia juris haud excusat*. A man may not excuse himself of criminal responsibility on the ground that he did not know that he was breaking the law, or by any such assertion relieve himself of liability upon a contract.<sup>2</sup>

So far back as the 23rd of Edward I, Champerty had been rendered illegal. In the old books it was said "Champertors be they that move suits at their proper costs for to have part of the gains". It is a crime at Common Law and is thus defined in Stephen's Digest of the Criminal Law: "Champerty is maintenance in which the motive of the maintainer is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject-matter of the suit shall be divided between the plaintiff and the maintainer".<sup>3</sup>

It has been freely, but erroneously, asserted that there is no law of Champerty in British India. It is true that it is not *eo nomine* an offence under the Penal Code. But it is obvious that in certain circumstances

<sup>1</sup> 33 & 34 Vict., c. 28.

<sup>2</sup> See the discussion of this maxim and the so-called "presumption" above alluded to, in Chapter II, p. 36, *ante*.

<sup>3</sup> 7th Ed., p. 146.

champertous dealings would fall within the mischief of that Code as a criminal conspiracy. It has been as freely, and as erroneously, asserted that there is no such thing as a champertous agreement which could be declared void under the Indian Contract Act. Yet there are numerous instances in the books showing that Courts in India know how to deal with the champertous conduct of suits. A recent pronouncement of their Lordships of the Privy Council<sup>1</sup> should serve to clear the air of any further misconception in the matter. In that case (*Valluri Ramanamma v. Marina Viranna*, [1931] 35 C.W.N. 633) their Lordships laid it down that in India agreements to finance litigation in consideration of having a share of the property, if recovered, are not *per se* opposed to public policy. But they may be so if the object of the agreement be an improper one, such as abetting or encouraging unrighteous suits, or gambling in litigation. Or, their enforcement against a party may be contrary to the principles of equity and good conscience, as unconscionable or extortionate bargains.

## 6. *Transit Insurance.*

Nowhere is property more obviously exposed to danger of one sort or another than when in transit. Thus it is that transit insurance in the modern world has provided the far-seeing insurer with some of his greatest opportunities. It is in this direction that insurance first began, and in which perhaps the greatest volume of insurance business is still done.

**Carriage by water.**—The transport of people, animals and goods by water, particularly by ocean-going ships, has, since the dawn of history, been one of man's major activities. Out of the maritime law of nations, and partly out of the general European law relating to carriers, has been evolved the law of marine insurance as we see it today. To the latter subject has been devoted an earlier chapter of this treatise.<sup>2</sup>

Insurance of goods to be carried over inland water-ways is not necessarily governed by the principles of marine insurance save where the terms of the policy may directly or by necessary implication attract those principles, as was the case in the instance cited at p. 185 of Chapter IV. Insurance of river steamers or of country boats as to hull, machinery, tackle, etc., follows the lines of marine insurance.

The rights and liabilities of the parties under contracts of carriage over inland water-ways in India are largely affected by the provisions of the Indian Carriers Act (III of 1865); for many of the inland shipping interests so conduct their business as in general to hold themselves out as "common carriers" within the meaning of that statute.

**Carriage by land.**—Carriage by land for more than two thousand years in Europe has been very largely undertaken by means of the great arterial roads, of which, for many centuries, those laid out and constructed by the Romans were the most magnificent examples. The Roman Law regarded the carrier as a bailee. In recognition of the peculiar dangers attendant upon confiding to a bailee so conditioned the carriage of property, the law of Rome placed upon the carrier the obligation of compensating the bailor for the loss of his goods to the full extent of their value,

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<sup>1</sup> The members of the Board participating in this judgment were Lords Atkin, Thankerton and Macmillan, with Sir George Lowndes and Sir Dinshah Mulla.

<sup>2</sup> Chapter IV, pp. 92 *et seq.*

with a severe penalty, namely, the payment of a further sum also equal to the value of the goods lost. From the circumstance that public carriers under the Roman Law were thus called upon to provide an indemnity, many students of the subject have regarded the law of England relating to common carriers, whereunder the latter are deemed insurers for the goods they accept for carriage, as derived from the Roman Law.<sup>1</sup> Derivation apart, the fact remains that by the Common Law of England a common carrier is not merely subject to all the incidents of bailment, but is also regarded as an insurer of the goods he carries against every peril save the act of God and the King's enemies. In 1830 the Carriers Act was passed in England, which placed the liability of common carriers upon a statutory basis. Similar legislation is to be found upon the Indian statute book, namely Act III of 1865 alluded to above.<sup>2</sup>

**Railways.**—The invention of the locomotive in England did not have the immediate effect of producing, even in a primitive form, that systematized method of transport of which a modern railway administration is the exponent. The locomotive when invented was, as it still is, a mere tractor. Its structure rendered it necessary to provide a rigid road for its operations. Stephenson himself spoke of "the marriage" of the train to its track as essential for the working of his invention. But having provided a suitable iron road, the early railway undertakings were prepared to admit upon it privately-owned tractors and privately-owned vehicles. At first they did not hold themselves out as carriers. For the use of their roadway they charged tolls, just as others did for user of such arterial roads in England as had come to be called turn-pike roads.<sup>3</sup> In the next stage many railway companies were prepared to do the actual hauling, and constructed a number of vehicles of their own for the purpose of transportation. In so acting they were styled "conveyors". Meanwhile various firms, styling themselves "carriers", had erected depots adjacent to railroads, had laid down their own sidings, connected them with the railway, and thus the carriers' goods (frequently in their own vehicles) were passed on to the railway company to be hauled by the latter in consideration of specified rewards. It very soon became plain, however, that such user of railways was every day becoming more and more impracticable; and by the beginning of the second half of the 19th century most English railway companies were holding themselves out as common carriers. As what they were then offering to do fell plainly within the then existing law relating to common carriers, English railways became thenceforward subject to all the liabilities to which any other common carrier was and is exposed, including that of being an insurer against all perils save the act of God and the King's enemies.

<sup>1</sup> The question of this derivation is debated in *Nugent v. Smith*, [1875] 1 C.P.D. 19, Brett, J. (afterwards Lord Esher), being of opinion that the Roman Law relating to bailments had been adopted by English Courts as part of the Common Law; Cockburn, L.C.J., insisting that the English Law of bailments, especially as applied to carriers, had an independent origin and a separate development. (See the same case in the Court of Appeal, [1876] 1 C.P.D. 423, 426-434.)

<sup>2</sup> For a discussion of the position of those common carriers in India to whom an analogous law now applies including those who are engaged in the carriage of goods by water, see Chapter IV, pp. 186-189, *ante*.

<sup>3</sup> In the earliest efforts to control user of certain arterial roads, such roads were cut up into sections, where toll-keepers were placed; and at those points there was a barricade which in its primitive form had consisted of a "spear" or "pike" placed horizontally across the roadway, and which was turned aside to permit the passage of each vehicle after the toll had been collected.

**Indian Railways.**—The early railways in India, as naturally, began by the work of private enterprise.<sup>1</sup> Today the majority of Indian railways are State-owned and State-managed: private companies having, with few exceptions, been bought out by the tax-payers of India, who have thus become the owners of the undertakings. It has, however, been the policy of the Government of India to maintain the unity of each of the separate systems; to administer, therefore, each railway undertaking separately, and to require each administration<sup>2</sup> so to work the line as to show a profit. Indian railway companies and administrations derive their powers today from the Indian Railways Act (IX of 1890), a statute which is a great improvement upon previous railway legislation in India. The controlling authority for all State railways, as also the co-ordinating authority in respect of the whole railway system of British India, is a body designated "The Railway Board", to which the Government of India (or Central Government as it is now styled) has delegated some of its functions. The Board is the creature of another statute, namely the Indian Railway Board Act (IV of 1905).

By section 72 of the Indian Railways Act the "responsibility" of an Indian railway "for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872". By sub-section 3 of the same section it is laid down that "nothing in the Common Law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration".

It is now necessary to refer briefly to the statute law which is thus attracted.

The law of bailment in India is dealt with in the Indian Contract Act which devotes a special chapter to the subject.<sup>3</sup> Section 148 is the definitive section and is in the following words:—

"148. A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

*Explanation.*—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment."

The degree of care of the property bailed which the law requires of the bailee is set forth in section 151 of the chapter and is in the following terms:—

"151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would,

<sup>1</sup> Of the State-owned railways four are State-managed, and five are still company-managed. The most prominent of the few remaining privately-owned undertakings is the Bengal and North Western Railway.

<sup>2</sup> The word "administration" as here used includes the management, whether the same be by the State or by a corporation. The word is more commonly used, in Indian law and practice, of railway undertakings which are State-owned and State-managed. (See sec. 3 (6) of the Indian Railways Act, 1890.)

<sup>3</sup> Indian Contract Act, Chapter IX, comprising secs. 148-181.

under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

The statute then proceeds to clarify the liability of the bailee in a separate section which is in terms as follows:—

"152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151."

The duty cast upon the bailee to return or deliver the property to the order of the bailor is provided for in section 160 which is in the following terms:—

"160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished."

The remaining section of consequence in the matter of responsibility is section 161 which is expressly attracted by section 72 (1) of the Indian Railways Act. The section is in these words:—

"161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."

From the foregoing provisions of the Contract Act the bailee's liability to pay compensation for the loss, destruction or deterioration of the property bailed is founded in his own default, which, by reason of the provisions of section 151 of the Contract Act, means that he has in some way failed to take as much care of the property in his keeping as an ordinarily prudent man would of his own. This, then, is a liability wholly different, both in kind and in extent, from that of an insurer who, for a monetary consideration, promises an indemnity, either co-extensive with the loss sustained, or to some extent definitely agreed upon between the parties to the contract of insurance. It is the limited liability of a bailee, therefore, which is not to be disturbed by the provisions of the Carriers Act of 1865 or of any doctrine relating to common carriers which has become part of the Common Law of England. Thus the ordinary liability of an Indian railway is not that of an insurer of the property it carries.

**Risk Notes.**—In England where the liabilities of railways under the general law are, as has been pointed out above, greater than those imposed upon Indian railways, it has long been permissible to such carriers to limit their ordinary liabilities by special contracts in a form approved by the requisite controlling authority. So, too, in India by virtue of the provisions of section 72 (2) of the Indian Railways Act an agreement limiting the responsibility laid down by section 72 (1) is permissible so long as it be in writing, and otherwise in a form approved by the Federal Railway Authority<sup>1</sup> and be duly signed by the person "sending or delivering" to the railway the animals or goods which are the subject-matter of the contract. The consideration to the railway customer for releasing the carrier from his ordinary liabilities as a bailee to the extent shown in the relative document, is the railway's undertaking

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<sup>1</sup> This authority is the creature of the Government of India Act, 1935. Till Federation becomes an accomplished fact the forms hitherto approved by the Railway Board must, it is submitted, be treated as fulfilling the intention of the statute.

to transport the goods at a reduced conveyance rate. Goods carried under these special contracts are, in railway parlance, spoken of as moving at Owner's Risk: those carried by the railway under all the liabilities of a bailee or insurer are said to be at Railway Risk.<sup>1</sup>

These special contracts in the form now in use relieve the carrier of all responsibilities in respect of loss, destruction, deterioration or of damage to the property from any cause whatever, "except upon proof that such loss", etc., "arose from the misconduct of the railway administration's servants".

Some ten forms of risk note are now in use on Indian railways. For ready reference of customers they are distinguished by the respective letters A, B, C, D, E, F, G, H, X and Y. They have been framed to meet the needs of particular kinds of contracts of carriage. For the purpose of the present treatise only a few of them need be made the subject of comment.

(1) "A" is used when articles are tendered for conveyance already in bad condition or so defectively packed as to be liable to damage, deterioration, leakage or wastage during transit. After reciting the condition in which they are in fact tendered and the consequent liability to damage, leakage or wastage in transit, the "undersigned" (who is designated "the sender" in the form) "agrees and undertakes" thereby "to hold the Railway administration over whose Railway the said goods may be carried in transit from.....station to.....station harmless and free from all responsibility for the condition in which the afore-said goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants".

There follows a clause whereby "through" transit (no matter by what method or methods of carriage) is provided for. It is in these words:—

*"This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit."*

(2) "B" and "H" are for use in connection with contracts of carriage the chief feature of which is a release from most of the liabilities of bailment in consideration of conveyance at a "specially reduced" or "owner's risk" rate, where an alternative higher rate at "railway risk" is available and publicly advertised. The Note in form "B" is used for a single consignment, while form "H" is used for a number of consignments over a given period. The effect of the latter contract crystallizes every time it is attracted by the terms of a relative railway receipt and consignment note.

In "B", after reciting that a particular consignment is being charged at a "special reduced rate instead of the ordinary tariff rate" the sender "in consideration of such lower charge agrees and undertakes to hold the said Railway Administration harmless and free from any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except upon proof that such loss, etc., arose from the misconduct of the Railway Administration's servants: provided that in the following cases:—

(a) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in

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<sup>1</sup> In the published lists of rates, whether in the pamphlets known as goods or coaching tariffs, or elsewhere, these risks are shewn by the letters "OR" and "RR" respectively.

accordance with the instructions laid down in the Tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire;

(b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a), when such pilferage is pointed out to the servants of the Railway Administration on or before delivery;

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit."

The operative portion of risk note "H" is to a similar effect.

**Misconduct.**—It is neither within the scope, nor necessary to the purposes, of this treatise to discuss the nice questions which have often arisen as to the facts which would go to establish "misconduct" within the meaning of these foregoing special contracts. The terms of risk notes A, B and H have been quoted only as examples of the degree to which railways in India have been permitted to contract out of their statutory liabilities as bailees. Nevertheless, since independent insurers of goods in transit are entitled to be subrogated to the rights of their assured against the carriers, some reference to the concept itself would seem to be necessary in the present chapter. The old form of risk note had "wilful negligence" where we now read "misconduct". It is believed that the revised form, which the commercial community had strenuously pressed for, has the word "misconduct" because that community and their special advisers seem to have imagined that it was going to be easier to convict a railway servant of misconduct than of wilful negligence. If so, events have hardly borne out the expectation.

The maze of difficulties which the history of earlier litigation reveals in regard to definitions of Negligence has already been alluded to earlier in this chapter. The corresponding English risk note has also got the substantive Misconduct, but to it is prefixed the epithet "wilful". Now in *Graham v. Belfast and Northern Counties Ry. Co.*, [1901] 2 I.R. 13, the Judge had thus defined wilful misconduct: "Wilful misconduct in such a special condition means misconduct to which the will is party, as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences". Lord Alverstone, C.J., four years later, in *Forder v. Great Western Ry. Co.*, [1905] 2 K.B. 532, 535, was prepared to adopt the above definition, but wished to see it modified by the addition of the following words: "or acts with reckless carelessness, not caring what the results of his carelessness may be".

No doubt it was the aim of those responsible for framing the present risk notes in forms B and H to enlarge the liability of those who own railway undertakings as well as those who serve such undertakings.

But in the matter of construction of a form it is the meaning of the words and not the intention of the author of the forms which the Courts have to look to. Already the notice of their Lordships of the Privy Council has been attracted to what Lord Thankerton (who delivered the judgment of the Board) described as a "bit of imperfect draughtsmanship" in risk note B. The same imperfection is not observable in the cognate form H. (*Surat Cotton Spinning and Weaving Mills, Ltd. v. Secretary of State*, [1937] 64 I.A. 176, 181.) No question of misconduct of the railway administration as distinct from its servants having arisen in that case their Lordships reserved their opinion on the draughtsmanship which had thus attracted their attention, till some occasion should arise when their opinion on the point would be necessary to a decision of the matters before them.

At the moment of writing, however, the word "misconduct" would seem not yet to have received a clear-cut judicial interpretation in the context, upon which the Courts in India can agree. The substantive Misconduct is already being subjected to the same judicial usage as had for many a long day rendered the concept of Negligence at once shapeless and intangible. One learned Judge finds no difference between "misconduct" and "wilful misconduct". Another regards it as well-settled that misconduct is not necessarily established by proving even culpable negligence. Lastly, we have the views which have been expressed by at least two of the Judges of the Bombay High Court in a recent case (*Bombay, Baroda & Central Indian Railway Co. v. Rajnagar Spinning, Weaving & Manufacturing, etc.*, [1929] 54 Bom. 105, 110 and 111). The Bombay Judges boldly elbow the Reasonable Man off the juridical stage. "I am not prepared" said Kemp, J., "to accept the test of the meaning of the word 'misconduct' as what a reasonable man would have done under the circumstances. I think the word suggests that a railway servant had been guilty of doing something which was inconsistent with the conduct expected of him by the rules of the company." Murphy, J., entertained the like opinion. "The risk note implies by 'misconduct' some action wherein the servants of the railway have done wrong or have omitted to take a precaution imposed on them by the rules under which they work, and a very general view of railway arrangements and of the duties of the railway administration is not really relevant in a case under this risk note." (*Ibid.*, pp. 113, 114.) It is permissible to prefer the latter view not only as sensible in itself, but as making for more certainty in regard to the law than can be reached from any of the other stand-points above described.

**Indian Railways as insurers.**—There is, however, nothing to prevent a railway from holding itself out as an insurer of passengers, animals or goods, and in fact a large volume of business is in India carried under what are called insurance terms. The power to insure articles of special value is conveyed by section 75 of the Indian Railways Act read with section 72 (1) of the same statute. The reader will, indeed, have observed that the limitations of liability laid down in the last-named sub-section are expressly to be read as "subject to the other provisions" of the Act. Now section 75 of the Act reads as follows:—

"75. (1) When any articles mentioned in the second schedule<sup>1</sup> are contained in any parcel or package delivered to a railway administration

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<sup>1</sup> The list scheduled to the Act comprises 35 genera including precious metals, precious or rare minerals, works of art, objects peculiarly fragile, time-pieces of every sort, narcotics, the vases of certain perfumes, silk, lace, furs, musical or

for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

(2) When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the person claiming the compensation.

(3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in the second schedule that a railway servant authorized in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein."

The question then to be determined is: do railways when purporting to act by virtue of the section just quoted take upon themselves the liabilities of insurers? For it is at least noticeable that the word "insurance" nowhere figures in it. Provisions but little dissimilar had found a place in two previous enactments in India, namely, in section 10 of Act XVIII of 1854 and section 11 of Act IV of 1879. Some conflict of views has arisen upon the true effect of the foregoing provisions. It is necessary therefore to examine the words of section 75 with some care.

In the first place it is to be observed that if any of the various articles included in a particular schedule to the Act be above the value of a hundred rupees and are consigned to an Indian railway without the declaration required by the section, the railway will carry such articles without any liability at all for their loss, destruction or deterioration. On the other hand, if the sender fulfils the conditions laid down in the section in respect of the carriage of any such article, the railway *will* be responsible for loss, destruction or deterioration. But what is the measure of such responsibility?

It had been decided by the Judge of first instance in *Raisett Chandmull Hamirmull and Another v. Great Indian Peninsula Railway Company*, [1893] 17 Bom. 723, when construing a contract of carriage under the Indian Railways Act of 1879, that the effect of paying an "increased charge" under section 11 for the carriage of something of special value was only to put the railway back into their position as bailees under the Contract Act; and that the restoration of such a responsibility did not make them insurers. On appeal ([1894] 19 Bom. 165) the Court, though reversing the decision on other grounds, did not expressly disturb the lower Court's view of the matter cited. Earlier the High Court at Calcutta had been called upon to construe the same section of the Act of 1879, but in quite another connection.<sup>1</sup> The wording of the present section is, however, conspicuously different from that of section 11 of the

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scientific instruments, documentary securities and any article of special value which the Central Railway Authority may notify from time to time in the Official Gazette.

<sup>1</sup> *Secretary of State v. Budhu Nath Poddar*, [1892] 19 Cal. 538.

Act of 1879, in that instead of the words "increased charge", we have "a percentage on the value so declared by way of compensation for increased risk". What that increased risk amounts to is to be gathered from the provisions of sub-section (2) which states that "the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared". What is this but an offer on the part of the railway to provide an indemnity to the full extent of the declared value of the property at risk in consideration of a monetary payment over and above the freight, such monetary payment being calculated *ad valorem*? And what is such a contract but one of insurance? It is submitted, therefore, that the Bombay decision represents an obsolete view of the relevant law; that under section 75 of the Indian Railways Act a railway administration in India is permitted to accept a liability greater than that of a mere bailee; and that where the consideration expressed in sub-section (1) has been paid, the same amounts to a premium; and that the relation between the railway and the sender is that of insurer and assured.

That contracts made under section 75 of the Indian Railways Act are contracts of insurance properly so-called is further evidenced by such a case as *Bombay, Baroda & Central India Ry. Co. v. Legal Representatives of Sanaullah*, [1934] 15 Lah. 596. There the plaintiff's respondents had declared certain goods and given their value and in so doing had named a figure above Rs. 100. They refused, however, to pay the *ad valorem* premium. On the other hand, they executed three risk notes. The trial court had allowed the plaintiff to succeed as for an insurance in respect of the non-delivery of six packages which had been the subject of what is sometimes described as a running-train theft. This judgment was set aside on appeal, the *ratio* of the decision being that the premium not having been paid, the contract was really one under section 72 of the Act, and the liability of the railway that of a bailee. Upon the facts their Lordships held that the administration succeeded in its defence under that section.

In a modern case (*Sorabji Dadabhai v. Bengal Nagpur Ry. Co., Ltd.*, A.I.R. [1936] Pat. 393), the plaintiff endeavoured for the purpose of obtaining his indemnity in a contract of insurance under section 75 to obtain his compensation on the basis of what he termed the "real" value of what had been lost to him as opposed to its "declared" value. The Court naturally disallowed anything of the kind, holding that he could not go behind the declared value. This was but to apply the principle already alluded to earlier more than once in this present treatise, that in a valued policy both parties are concluded by the valuation, however conventional, which they have chosen to put upon the property at risk for the purposes of a contract into which they have entered.

Touching such transactions as we have been considering, railways in India rarely, if ever, re-insure, and thus are their own insurers in respect of the indemnities for which they are liable to their customers under the special contracts alluded to.

**Railway Insurance in practice.**—What in practice is required to enable railway customers to insure goods in transit has been reduced to a minimum. All that a customer has to do is to fill in the ordinary Consignment Note so as to include a proper description of the articles which he desires to insure and a statement of the value he puts upon them. If that value be anything under Rs. 500, the head goods clerk or the Station Master at the place of despatch has authority, it seems,

to bind the Administration by making an endorsement on the face of the consignment note indicative of the fact of insurance and the value, by appending his signature. As the consignment note itself has to be signed by the sender or his agent the document when fully executed in the manner described represents both the terms of the contract of carriage and those governing the contract of insurance between the parties. The terms of the latter contract are, in part, to be found printed upon the reverse of the document. In many instances these are set forth under the general and misleading caption "Notice to Consignors". They are, in fact, "Conditions" and should be described as such.

For goods whose value is declared at any sum exceeding Rs. 500 the authority of the Divisional Superintendent or District Traffic Superintendent is required so as to bind the Administration. But the form of contract, as above described, is the same in every case.

By condition 6 the Administration claims a right of re-measurement, re-weighment, re-classification and re-calculation of charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or undercharged.

By condition 4 all claims in respect of loss or damage must be made to the clerk-in-charge of the station to which the goods have been booked. Such a claim must be made before delivery is taken and must be accompanied by a written statement of the description and contents of the articles missing or of the damage received. The written statement has to be sent to the authority mentioned in the particular condition. A breach of the matters stated as requisite in this condition is said to absolve the Administration from all responsibility.

The last-named condition is not happily drawn. In the statute what is scheduled is a number of "articles" in the sense of *genera* out of which might be made up any number of "parcels" or "packages". The relative section of the Act and the words of condition 2 refer to loss or deterioration of "parcels" or "packages". It is plain that the word "article" as used in condition 4 means the package itself.

The word "value" and the expression "special value" have been the subject of judicial interpretation. In *Blankensee v. L. & N. W. Ry. Co.*, [1881] 45 L.T. 761, 762, "value" was held to mean the value to the consignor of the goods. It can only arise when a claim is made; for it is only the value at the date when the indemnity becomes due which is relevant. It has been held in India (*Great Indian Peninsula Ry. Co. v. Ramachandra Jagannath*, [1918] 43 Bom. 386) that if an article has special value to the owner and he desires to recover that value, he may so declare it and insure his goods accordingly. But on a loss occurring, the liability of the railway would be limited to the "true" value. It is submitted that the true value would, in fact, have to be determined in accordance with the general principles of the law relating to insurance. For what is offered is an indemnity. In that view there is no need for any special construction of the word "value" as used in connection with railway insurance.<sup>1</sup>

As to the word "loss" as used in section 75 of the Railways Act, and in any form of contract designed to implement the rights of railway carriers and their customers under that section, there is a general consensus of judicial opinion that it has but one meaning wherever used in Chapter VII which contains sections 72-82. Some text-book writers

<sup>1</sup> See, upon the topic of "value" for purposes of a claim under the law relating to insurance, what is said in Chapter V, pp. 288-290, *ante*.

speak of a conflict of judicial decisions as to the meaning of the word in this context. But it is submitted that on an examination of the authorities the supposed conflict is rather apparent than real. All the relevant authorities, English as well as Indian, were considered by Page, J., in *East Indian Ry. Co. v. Jogpat Singh*, [1924] 51 Cal. 615; and it is submitted that he expressed the true view of the matter when he held that the word "loss" as used in the risk note which was in controversy in that case, and as used throughout the relative chapter of the Indian Railways Act, "does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit, and such 'loss' occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily or through inadvertence, loses possession of the goods, and for the time being is unable to trace them. . . . The term 'loss' denotes a fact, not a cause of action. A valid cause of action against a railway in India for damages for the non-delivery of goods consigned to it for carriage must be based either on contract or on tort, and must arise from the breach of some duty owed to the plaintiff by the Railway Company. Proof of the fact that a loss of the goods has occurred may sometimes found, sometimes defeat, such a cause of action. But a cause of action for loss without more is unknown to the law. Non-delivery of the goods consigned to a railway for conveyance may be due to the fact that the goods are being deliberately detained by the railway, or that they have been misdelivered to some person other than the consignee, or that they are lost. It does not therefore necessarily follow that by proving the non-delivery of such goods, the loss of the goods is also proved; for non-delivery or misdelivery of goods may be due to loss or may be due to other causes." A modern case in Lahore, *Haryana Cotton Mills Co. v. Bombay Baroda and Central Indian Ry. Co.*, [1927] 8 Lah. 555, decided that the term "loss" in section 77 does not include a case of conversion, i.e., detention coupled with neglect or refusal to deliver up the article detained after demand made.

The word "deterioration" has been considered in a number of cases. There is deterioration where a parcel is impaired in value by the abstraction of part of its contents. (*Bengal & North Western Ry. Co. v. Tupan Dass*, [1926] 5 Pat. 465.) Decrease in value consequent on detention has been held to fall within the notion. But the ratio of this decision is dissented from in *East Indian Ry. Co. v. Diana Mal-Gulab Singh*, [1924] 5 Lah. 523. So far, however, as the law relating to insurance is concerned, where the indemnity is offered in respect of damage done to a consignment, the cause of the damage, e.g., prolonged detention, is immaterial. All that is required to be shown is the condition of the goods when accepted for carriage and their state at destination or on delivery. The compensation offered is in respect of some injury done to the goods in the meantime; and the indemnity measured in money will be the difference between the value of the goods in the condition as accepted and that found at destination or on delivery.

**Competitive Insurance.**—There seems reason for supposing that insurance by the railways themselves is not as popular with the commercial community in India as it might be. Rightly or wrongly, delay in the disposal of claims is often put forward as one of the chief reasons. Anyhow, a very large volume of business is done by insurance companies in covering the transport of property by Indian railways. Insurers

are readily found to cover transit whether the contract be at "OR" or "RR" rates, and whether there be an additional insurance with the railway or not. Naturally, where the assured is thus doubly covered the principles of subrogation and contribution will apply.<sup>1</sup> Insurers are equally ready to give the requisite cover in the form of floating policies. In most cases the premiums charged are arrived at by a tariff based on mileage, whereas the premium charged under a contract of insurance with an Indian railway is calculated *ad valorem* the consignment, as declared by the sender.

In practice, the form of policy offered in respect of goods carried by railway in India often follows one of the customary forms used for ordinary marine insurance. Appropriate clauses are, of course, inserted.

In general the mercantile community is anxious to cover itself in respect of losses occasioned by railway accidents of all sorts. A typical clause with that end in view is thus worded:—

*"This insurance commences from the time the Railway receipt is issued and covers fire risk in Railway premises and risk or loss or damage occasioned by fire, collision, breakage of bridges, derailment or accidents of a like nature whilst being conveyed by train. Risk to cease 3 days after arrival of train at destination, or on delivery by Railway, whichever may first occur."*

**Stamps.**—A contract of insurance effected by means of an instrument conforming to a policy as understood in the Law Merchant, and if within the definition of section 2 (19) of the Indian Stamp Act, would apparently have to be stamped. The ordinary insurance policy is so stamped. The document which, it is submitted, evidences the contract of insurance between an Indian Railway and its customer as amounting to a contract of indemnity falls, it is submitted, within section 2 (19) of the Indian Stamp Act. Yet it is never stamped. In practice it seems that some insurers in India treat their transit policies as marine policies, others treat them for the purposes of stamping as fire policies. It is reasonably plain that the Stamp Act needs amendment so as to remove these anomalies.

**Extent of Transit Insurance.**—A policy restricted to named perils occurring during the transit cannot be utilised to found a claim for a loss occurring after the transit is over. (*Baring Bros. & Co. v. Marine Insurance Co.*, [1894] 10 T.L.R. 276, C.A.; *Deutsch-Australische Dampschiffs-gesellschaft v. Sturge*, [1913] 30 T.L.R. 137; *Ewing & Co. v. Sicklemore*, [1918] 35 T.L.R. 55, C.A.) The intention of the parties as to when the transit is to be regarded as finished needs to be expressed in such policies with precision, for nice questions often arise as to when a ship is an "arrived" ship within the meaning of a shipping contract or a policy of insurance, which are avoided in a policy covering a transit from warehouse to warehouse. In like manner it may be an equally nice question at what precise moment a transit by rail has come to an end. Was it the intention of the parties that the transit should be regarded as at an end when the individual wagon or wagons containing the animals or other property at risk shall have "arrived" at the particular railway station named as the destination in the railway receipt and connected documents? Or was it intended to extend the notion of transit till the last shunting operation shall have been completed and the wagon docked for unloading? Or, again, does the transit continue after the wagon be emptied of its

<sup>1</sup> For a discussion of these topics, see Chapter III, pp. 72-77, *ante*.

contents, and until the property be placed in some other conveyance, e.g., a cart or lorry, or even until the property be finally off-loaded at the consignee's door?

From the terms of the clause quoted above<sup>1</sup> it is to be noticed that the risk continues till the "arrival of train at destination" or "delivery by railway, whichever may first occur". It is a little difficult to see how the railway could deliver (unless, alternatively, some part of the journey be by lorry) prior to the arrival of the train at destination. Anyhow, this clause presents an example of the necessity of determining when a train is "arrived", within the meaning of the contract. It is submitted that, at any rate from the railwayman's point of view, a train is deemed to have "arrived" at a given station when she is first within the station limits as a complete unit. It is thought, moreover, that in a transit policy, unless there is elsewhere some other provision indicating a different interpretation, "arrival" should be given the meaning which it would have for the railway administration. Train registers are maintained by the railway servants on duty in the several cabins. In very small stations, with only a single platform and no cabin, registers are maintained by the Station Master's staff. A train is booked "in" when its rear guard's van has passed the cabin or the centre of the station, as the case may be. The limits of any given station are demarcated on the ground; and there are signal cabins within those limits. The question, therefore, as to when any given train is an "arrived" train, from the transportation point of view, can readily be determined.

Transit insurance policies are often cast in the form of a marine policy, but will not be so construed if no part of the transit contemplated is to be by sea. (*Joyce v. Kennard*, [1871] L.R. 7 Q.B. 78, 83.) In *Henderson v. Underwriting & Agency Assocn.*, [1891] 1 Q.B. 557, the policy was cast in the traditional marine form, but the words "perils of transit or conveyance" appeared in place of the words "perils of the seas". Thus, though the policy contemplated a transit partly by land and partly by water, the policy was not construed as a marine policy, but as a special transit policy. The true construction of a transit policy must inevitably have important legal effects. For instance, insurers as defendants in an action on a marine policy are entitled to peculiarly extensive discovery of documents, including always the ship's papers.<sup>2</sup> In the case just cited so extensive a discovery was refused, on the ground that the policy was not a marine policy. In *Harding v. Bussell*, [1905] 2 K.B. 83, C.A., the Court of Appeal construed a warehouse to warehouse policy as a marine policy, and allowed the extended discovery alluded to. In the meantime Kennedy, J., had (in *Village Main Reef Gold Mining Co. v. Stearns*, [1900] 5 Com. Cas. 246) followed *Henderson's* case (*supra*) and had given the usual instead of the extended discovery. Mathew, L.J., in *Harding v. Bussell* dissented from the view, which he seemed to think Kennedy, J., to have entertained, that whenever any portion of the venture is a transit by land the policy cannot be a marine policy and the extended discovery cannot be ordered.

**Discovery.**—The growing system of granting transit policies (with or without the warehouse to warehouse clause) in which a substantial portion of the journey is overland, has recently raised in an acute form the question as to how far the practice of the

<sup>1</sup> See p. 324, *ante*.

<sup>2</sup> As to which, see *infra*, under "Discovery".

Courts, in claims upon policies of marine insurance pure and simple, is to be followed where the policy in suit, though including maritime risks, extends to others incidental to overland carriage. It has for much more than a century been the practice of the English Courts to grant underwriter-defendants to an action on a marine policy discovery of the ship's papers, and to do so immediately (if asked) on the issue of the writ in the action; so giving such defendants, before they put in their defence, a much better insight into their opponent's brief than any other litigant can ever get, except in rare instances and by extraordinary processes. Naturally there have been repeated attempts to obtain an extension of this privilege for the benefit of insurers who are being sued on transit policies; the effort being made wherever the policies incidentally include risks attending the passage of goods by water. Hitherto it has not seemed too easy to extract any very clear principle from the cases wherein such efforts have succeeded, or from those wherein they have failed. In a recent case (*Leon v. Casey*, [1933] 3 Comp. Cas. (Insurance) 80), the Court of Appeal in England has endeavoured to lay down something approaching a test, by which the merits of such an application may be judged. Many of the difficulties in the earlier cases had arisen from the fact that though the policy in suit followed the common marine form, the misadventure giving rise to the claim had taken place during the land transit. Conversely, often enough, where the policy happened to be in a form other than the common marine form, and had all the appearance of being a transit policy principally concerned with an overland adventure or adventures, the misfortune had occurred during an incidental voyage. The interest as well as the merit (if such an expression be not disrespectful) of the judgment now to be alluded to lies in its insistence upon the irrelevance of the claim, and the materiality of the contract where the true substance of it be laid bare on reading the policy as a whole.

In the particular instance the policy was in the marine form, but covered land adventures both before and after the purely marine risks respectively attached or determined. The ship named was the "*Lotus*". A cargo of hosiery and cotton goods covered by the policy was lost on a land journey by motor lorry while on its way to the ship. Holding that the policy was not merely in form, but in substance, a marine policy with added risks, the insurers were held entitled before delivering their defence to an order in the usual form directing discovery of the relative ship's papers and connected documents. (*Leon v. Casey*, *supra*.)

What is the position in India regarding this matter? For answer we need to know what is included in the word "discovery", as used by the Lords Justices in the case cited. In strictness, discovery under the English, as well as the Indian, rules of procedure is limited to giving a list (ordinarily on affidavit) comprising the description of every document which is or has been in the possession or power of the party compelled to give this information "relating to any matter in question" in the suit. This he does, without prejudice to any right which the law confers upon him to refuse "inspection" of any particular document or class of documents.

In strictness, then, there is a difference between offering inspection of any document, and merely conveying a list of them to the other party. In the sense, however, in which the word "discovery" is used with reference to the English practice in Marine Insurance cases, the word includes the right to inspect, and extends from the ship's papers to numerous connected documents. The necessary application to the Court

may be made at any time after appearance in the suit, and it requires no affidavit to support it. The order may be made against "all persons interested", even against persons who may be out of the jurisdiction. It is as much open to underwriters who are re-insurers as to original insurers. The form of order which has been gradually evolved in England includes a stay of all proceedings till the requisite discovery has been given to, and enjoyed by, the defendant.

In India the Court's powers in the matter of Discovery are the subject of Order 11, rr. 12, 13 and 19 (3).<sup>1</sup> Ancillary to those rules are others dealing with the topics of production and inspection. These are to be found in the same Order, where they appear as rr. 14 to 19. Were the Court's powers to be confined to what is vouchsafed by the provisions of Order 11 it would appear not easy to make a comprehensive order of the character, or in the form, which is procurable in England. It would seem, therefore, important, in the first instance, to determine what are the principles which inform the English practice in this regard, and to see how far existing Indian machinery is capable of enforcing such a principle if recognised in this country. Prior to the modern orders of the Supreme Court in England—orders which came into being after the Judicature Acts of the early 'seventies—such discovery as we are now discussing was not obtainable in the Common Law Courts. To get it one had to apply for a "bill" in equity.<sup>2</sup>

"Partly in consequence of that" said Scrutton, L.J., in *Leon v. Casey*, [1933] 3 Comp. Cas. (Insurance) 80, "and partly in consequence of the fact that insurance has always been said to be a transaction involving the utmost good faith, where the assured is bound to communicate everything in his knowledge to the Insurance Company, both at the inception of the risk and at every subsequent proceeding during risk—for instance, where he makes a claim—the King's Bench Court have invented the order for ship's papers which is made as soon as the writ is issued in an action on a policy of marine insurance".

In India the present order for discovery is the creature of yesterday. Such discovery as was obtainable in the days of the old chartered High Courts was granted upon equitable principles which English judges had brought with them to this country. The earlier marine insurance cases in India, as also the more modern instances, alike display a recognition that contracts of insurance generally are governed by the rule of the utmost good faith. There would seem, then, to be no more impediment in India to the exercise of the inventive faculty than had been brought to bear upon the matter by modern-minded judges of the Court of King's Bench in England. Once assume that the Courts in India act upon principles which have long commended themselves to the Courts in England that the ends of justice require a comprehensive order giving discovery and inspection of this class of documents before marine insurers are called upon to file their defence in a suit upon a marine policy, and one presumes the Courts will not fail to notice that Order 11, r. 12, would appear to admit of an application for discovery being made at any time, and that, correspondingly, r. 15 of the same Order permits the Court at any time to entertain an application for inspection. In amplification of powers

<sup>1</sup> This is part of the Code of Civil Procedure (Act V of 1908).

<sup>2</sup> Suits and other proceedings in the old Court of Chancery were commenced by filing documents (such as we in India call plaints) styled "bills". The corresponding document which commenced proceedings in the Common Law Courts was called a "declaration". Both have since been superseded by a pleading known as the "Statement of Claim".

requisite to give effect to the foregoing principles touching discovery in marine insurance cases the student's attention is drawn to the provisions of sec. 161 of the Code of Civil Procedure whereby nothing in that Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice.

It is thought, then, that marine insurers might reasonably expect the Courts in India to regard themselves as being competent to pass orders for discovery in marine cases upon lines analogous to those which now-a-days issue as of course from the King's Bench Division in England, and, secondly, as likely to hold that the ends of justice in this class of case entitle underwriters in India to the Court's assistance in that regard.

There remains the question whether the Courts in India in relation to other transit policies will be minded to go further than the Court in *Leon v. Casey*, *supra*. Slessor, L.J., confessed to such conservative instincts as disinclined him to extend the jurisdiction so as to benefit insurers generally. Greer, L.J., assented with admitted reluctance to the order proposed. But are the Courts in India to be necessarily so hampered? There is no question of being bound by their own or a superior court's previous decisions on this matter. For there are none. On principle it is no easy thing to rest a privilege given to one class of insurers upon the doctrine of *uberrima fides*, while denying it to another class. For if there be one principle of universal application in the law relating to insurance, as to which there has never been any conflict of opinion in India, it is that the relationship of insurer and assured is essentially one to which that doctrine applies. Accordingly it would be but respectful to suppose that the Courts in India, if and when called upon to deal with this matter, will be chary of permitting themselves to be fettered by decisions not binding upon them, or to be affected by a history of adjectival law elsewhere, in which the predecessors in India of the present High Courts had not shared and to which the present Courts have not contributed.

**Carriage by air.**—The law of the air has inevitably undergone profound changes by reason of the advance made in aeronautics during the present century. In the early days of ballooning the question was at least academically raised as to whether the passage of a balloon through the superincumbent air above the land of another would constitute a trespass. In the law of England the ownership of land carries with it the ownership of the superincumbent air space *usque ad coelum* (right up to the heavens). How, then, could it be said that for someone else, without leave or license, to make use of that air space was *not* a trespass entitling the owner of the land to redress by an action at law against the trespasser, *quare clausum fregit*—"because he has broken the close"?<sup>1</sup> Yet Lord Ellenborough let fall an observation or two, not necessary to the decision of the matter before him, which cast a doubt on whether passage through the air-space of another would amount to a trespass. Lord Ellenborough's words were "I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*". [*Pickering v. Rudd*, [1815] 4 Camp. 219; 171 E.R. 70 N.P.] This *obiter dictum* was considered half a century later in

<sup>1</sup> For a note on the early form of the action of trespass in relation to land and the legal conceptions upon which it was founded, see p. 299, *ante*.

*Kenyon v. Hart*, [1865] 6 B. & S. 249, when Blackburn, J., expressed himself thus: "I understand the good sense, though not the legal reason, of Lord Ellenborough's doubt whether an action of trespass would lie against a man passing over the land of another in a balloon". In fact, there is nothing but the *obiter dictum* of Lord Ellenborough to support the notion that in the law of England it would not be a trespass. It is, indeed, for that reason that it has been found necessary to provide legislation which, in aid of aeronautics, shall prevent landowners exercising their full rights over the superincumbent air. It will be noticed, when we examine the corresponding legislation in India, that the rights of the landlord in this respect, though now limited by the necessities of aviation, are by no means wholly destroyed. It so happens that the English brought with them to India this conception of the ownership of land carrying with it exclusive rights in the air-space above it *usque ad coelum*. Accordingly it was found necessary in India, as in England, to effect a compromise between the age-long right of the landlord, and what should now be recognised as the newly-acquired right of the aviator, when flying otherwise in obedience to law and with no intent to annoy.

**Aviation Control.**—The control of aviation in India is now the subject of statute. Here reference is made to the Indian Aircraft Act (XXII of 1934) which extends to the whole of British India including British Baluchistan and the Sonthal Parganas.<sup>1</sup> It was framed to "make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft".

By section 2 (1) "aircraft" is defined as meaning "any machine which can derive support in the atmosphere from reactions in the air, and includes balloons whether fixed or free, airships, kites, gliders and flying machines".

By section 17 the rights of landowners and the Common Law of trespass alluded to above are modified to the extent shown by the words of the section which reads as follows:—

"No suit shall be brought in any civil court in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather and all the circumstances of the case is reasonable, or by reason only of the ordinary incidents of such flight."<sup>2</sup>

On the other hand, certain direct sanctions have been created by the statute, making for the greater safety of those who live and work upon the surface of the earth. Among the considerable powers taken by the Central Government to make rules for implementing the purposes of the statute is included the making of rules prohibiting flight by aircraft over any specified area, either absolutely or at specified times or subject to specified conditions and exceptions (section 5 (2), cl. (i)). An infringement of any such rule renders the aircraft concerned liable, on the conviction of its owner or the person in charge of it, to forfeiture to His Majesty (section 13).

The scope of the present treatise does not permit an exhaustive study of the statute referred to. It must suffice to call attention to the very wide powers which Government takes (a) to make all such rules as

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<sup>1</sup> By it are repealed earlier Acts: one dating from 1914 and the remnants of a still earlier statute of 1911.

<sup>2</sup> This is a reproduction of sec. 9 (1) of the English Air Navigation Act of 1920 as amended by the Air Navigation Act, 1936.

may appear to it necessary for carrying out the Convention<sup>1</sup> relating to the regulation of aerial navigation, 1919, with its additional protocol of 1920 and any amendment which may be made thereto under the provisions of article 34 thereof, which sets up an international commission for aerial navigation under the auspices and management (such as it is) of the League of Nations; (b) under section 5 to make general rules to implement the advertised purposes of the statute as shown in its preamble and, under sub-section (2) of the same section, for a large number of special objects of which one may well be of ultimate importance to insurers, i.e., that touching the prohibition and regulation of the carriage in aircraft of any specified article or substance; and (c) under section 6, to the large powers taken to make orders in emergency. Among these may well be orders from which hardship of no ordinary nature would result. In particular instances of such hardship a right to compensation is given under sub-section (2) of the section. That sub-section is thus worded:—

“Any person who suffers direct injury or loss by reason of any order made under clause (c) or clause (d) of sub-section (1) shall be paid such compensation as may be determined by such authority as the Governor General in Council may appoint in this behalf.”

The two clauses of the previous sub-section thus attracted are respectively in these words:—

“(c) prohibit, either absolutely or conditionally, or regulate the erection, maintenance or use of any aerodrome, aircraft factory, flying-school or club, or place where aircraft are manufactured, repaired or kept, or any class or description thereof; and

<sup>1</sup> The Convention expresses on the part of the High Contracting Parties recognition that every Power has complete and exclusive sovereignty over the air space above its territory (which includes the national territory both of the mother country and of the colonies and of the territorial waters adjacent thereto). Each contracting State undertakes, in time of peace, to accord freedom of innocent passage above its territory to the aircraft of other contracting States, provided that the conditions laid down in the Convention are observed. Each such State is entitled, for military reasons, or in the interest of public safety, to prohibit the aircraft of other States from flying over certain areas of its territory, the position and extent of which must be notified.

Aircraft possess the nationality of the State on the register of which they are entered.

Every aircraft of a contracting State has a right to cross the air space of another contracting State without landing, but must follow the route fixed by the State over which the flight takes place; it is obliged to land if ordered to do so; and every aircraft which passes from one State into another must, if the regulations require it, land at one of the aerodromes fixed by those regulations.

Aircraft when engaged in international navigation must be provided with (1) a certificate of registration; (2) a certificate of air-worthiness; (3) certificates and licenses of the Commanding Officer, Pilots, Engineers, and Crew; (4) if it carries passengers, a list of their names; (5) if it carries freight (i.e., cargo in any form), bills of lading and manifest; (6) Log books; (7) if equipped with wireless, the requisite special license.

The carriage by aircraft in international navigation of explosives, and of arms and ammunitions of war is prohibited, and each State may prohibit or regulate the carriage of photographic apparatus, and, as a measure of public safety, any other object.

The Convention is in force in the following States:—The Argentine, Australia, Belgium, Bulgaria, Canada, Denmark, Eire, Estonia, Finland, France, Great Britain and Northern Ireland, Greece, India, Iraq, Italy, Japan, Latvia, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Roumania, Siam, Spain, Sweden, Switzerland, Union of South Africa, Uruguay and Yugoslavia.

(d) direct that any aircraft or class of aircraft or any aerodrome, aircraft factory, flying-school or club, or place where aircraft are manufactured, repaired or kept, together with any machinery, plant, material or things used for the operation, manufacture, repair or maintenance of aircraft shall be delivered, either forthwith or within a specified time, to such authority and in such manner as he may specify in the order, to be at the disposal of His Majesty for the public service."

Finally, by section 8 the statutory authority may detain any aircraft if, in the opinion of such authority, having regard to the nature of the intended flight, the flight of such aircraft would involve danger to persons in the aircraft or to any other person or property; or such detention is necessary to secure compliance with any of the provisions of the Act or of the rules applicable to such aircraft; or such detention is necessary to prevent contravention of any rule made under clauses (h) or (i) of section 5 (2). The last-named clause has been set out above. Clause (h) has reference to rules prescribing the air-routes by which, and the conditions under which, aircraft may enter or leave British India, or may fly over British India, and the places at which aircraft shall land. The power so taken under the foregoing section includes that of making rules regulating all matters incidental or subsidiary to the exercise of the power.

It is obvious that powers so wide in the matter of prescription as well as of interference in aviation for commercial purposes and public and private uses generally, have to be watched with some care alike by insurers and assured. At any moment it may turn out that a contract of carriage or a particular adventure is illegal as being contrary to some express provision of the statute, or of some rule having statutory force, or, again, because it is in conflict with some other statute affecting the carriage of goods by air. In such circumstances a contract to cover an adventure itself illegal would be void, while from particular circumstances surrounding individual contracts of insurance covering air risks the contract might be voidable.

Already "through" transit partly by road, partly by rail and partly by water and/or air is in use, and nice questions of law are bound to arise touching the effect on the contract as a whole (whether the same be one of carriage or of insurance covering the entire transit) as to the effect of some illegality or breach of regulations to which, under the Convention already alluded to, the air carrier must submit. It seems evident, therefore, that policies designed to give proper protection alike to insurer and insured in the matter of aerial transport need to be framed with reference to the realities, and that to seek to adapt a conventional marine policy to carriage by air by the mere insertion of one or two clauses and an aptly-worded description of the risk will at least be hazardous.

Before leaving the subject of the Indian Aircraft Act, 1934, three other sections must be briefly referred to. Government, under section 16, takes power to declare that any or all of the provisions of the Sea Customs Act (VIII of 1878) shall, with such modifications and adaptations as may be specified in the relative notification, apply to the import and export of goods by air. By section 9 the provisions of part VII of the Indian Merchant Shipping Act (XXI of 1923), relating to Wreck and Salvage, are made to apply to aircraft on or over the sea or tidal waters as they apply to ships, and the owner of an aircraft is to be entitled to a reasonable reward for salvage services rendered by the aircraft in like manner as is the owner of a ship. Lastly, by section 7, Government takes powers to make rules touching the investigation of accidents occurring within British India.

**Carriage of goods by air.**—We now turn to the later statute which aims at implementing a pre-existing Convention between a number of States with reference to the carriage of goods by air. Without a working knowledge of these two statutes and the statutory rules, the insurance of goods carried by air will be more hazardous than it need be. The Convention to which attention will now be drawn is of recent origin; yet the case-law to which corresponding legislation has given rise in England is important though at present of but meagre dimensions. The Convention alluded to was signed at Warsaw, on the 12th of October, 1929. It laid down certain principles, for the object of the conference which thus culminated in the Convention was "the unification of certain rules relating to international carriage by air". These rules now deal in considerable detail, and on lines analogous to corresponding rules in respect of maritime carriage, with the liability of the carrier, the nature of the requisite documents, and certain provisions touching combined carriage. The various contracting parties afterwards framed domestic legislation to give effect to what had thus been agreed upon. India, by its Carriage by Air Act (XX of 1934), was not behindhand in this respect.<sup>1</sup> The preamble to the Act exposes a dual object; for, after acknowledging the expediency of British India acceding to the Convention and making provision for giving effect to it, it is stated to be also expedient to make provision "for applying the rules contained in the Convention (subject to exceptions, adaptations and modifications) to carriage by air in British India which is not 'international carriage' within the meaning of the Convention".

In the statute the rules agreed upon at Warsaw form the subject-matter of the First Schedule. These, then, will apply directly to international carriage within the meaning of the Convention; and it is these rules, again, which are to be adapted, and if necessary modified, to carriage by air in India, where such carriage is not of the kind which the Act recognises as "international". The schedule itself is divided into chapters, the first of which contains two rules only. Of these Rule 1, sub-rule (3), defines "international carriage" for the purposes of the statute and the Convention which gave it birth.<sup>2</sup>

By Rule 2 (2) it is declared that the rules in the First Schedule do not apply to carriage performed under the terms of any international postal Convention.

It is important to notice at the outset that by virtue of section 2 (1) of the Statute, rules contained in the First Schedule are to have, subject to all other provisions of the Act, the force of law in British India in relation to any carriage by air to which the rules apply, "irrespective of the nationality of the aircraft performing the carriage". In all probability it was intended that aircraft of foreign nationality should be obliged to act in British India in accordance with any rules contained in the First Schedule, which, by virtue of a notification under section 4, might have been made applicable to carriage by air other than "international carriage" as defined in that Schedule. But, in strictness, it might be held that the absence of any such words as "or to which those rules may be extended" after the word "apply" in section 2 (1) makes it impossible for the Central Government, by any such notification, entirely to control carriage by foreign aircraft except in circumstances which are clearly within the definition of international carriage.

<sup>1</sup> Relevant extracts from this statute are printed as Appendix VI to this treatise. See pp. cxi-cxlvii, *post*.

<sup>2</sup> See *ibid.*, p. cxi, *post*.

All rules under the Act are to be found in the two Schedules thereto: the Statute itself (unlike the Aircraft Act) not conferring rule-making powers upon the Central or upon any local government in British India.

By Rule 1 (1) all the rules are made applicable to carriage by air whether the same be performed gratuitously or for reward. But Rule 34 exempts from their operation anything in the nature of "international carriage" by air where the same is performed by way of experimental trial by an air navigation undertaking, when any such trial has for its object the establishment of a regular line of air navigation. Nor do the rules apply to "carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business". One may surmise that rescues performed by air would be within the last-named exception. The expression "days" when used in the rules is to be understood as meaning current days and not working days.<sup>1</sup>

Chapter II of the First Schedule concerns itself with documents of carriage. The chapter is divided into three Parts, of which the first two concern passenger and luggage tickets, and Part III the air Consignment Note. The last-named Part embraces Rules 5 to 16 of the Schedule. Chapter III, which includes Rules 17 to 30, is devoted to the subject of the liability of carriers by air. Chapter IV provides a single rule relating to combined carriage. The Second Schedule consists of four rules only. These relate to the subject of an air carrier's liability in the event of a passenger's death.

It is not proposed, in the present chapter, to comment upon the statutory provisions which are thus enforceable in India in regard to contracts of international carriage by air, other than those which relate to the carriage of goods, and which concern the liability of air carriers in respect of the relative contracts. The other provisions of the Act concern the topic of Accident Insurance, and as such will be dealt with in a later chapter of this treatise.

The corresponding statute in England has been very recently considered by the Court of Appeal in the case of *Grein v. Imperial Airways, Ltd.*, [1936] 2 All E.R. 1258.

The facts of the case concerned the carrier's liability for the death of a passenger, and so the decision arrived at upon the terms of the particular contract agitated are outside the scope of the present chapter. But certain observations of Greene, L.J., who delivered the first of the majority judgments, are worth quoting.

"The object of the Convention", said the Lord Justice, "is stated to be 'the unification of certain rules relating to international carriage by air'. By 'unification of certain rules' is clearly meant 'the adoption of certain uniform rules', that is to say, rules which will be applied by the courts of the High Contracting Parties<sup>2</sup> in all matters where contracts of international carriage by air come into question. The rules laid down are in effect an international code, declaring the rights and liabilities

<sup>1</sup> Thus Rule 35. Its substance might more artistically have been included in Chapter I of the First Schedule, that being the definitive chapter; and it could conveniently have found a place there as Rule 1, Sub-rule (2).

<sup>2</sup> A majority of the House of Lords in *Philippson v. Imperial Airways, Ltd.*, [1939] 1 All E.R. 761, has decided for the purpose of interpreting the same statute that the term "High Contracting Party", as used in the Convention, must be construed as including signatory States, whether or not they had ratified, and also acceding States. International carriage, they held, was in the Convention intended to be defined as carriage to and from the territory of the signatories, whether or not they eventually ratified the Convention and made the Convention part of their domestic law. (See the discussion of this case, p. 338, *post*.)

of the parties to contracts of international carriage by air; and when, by the appropriate machinery, they are given the force of law in the territory of a High Contracting Party, they govern (so far as regards the courts of that party) the contractual relations of the parties to the contract of carriage of which (to use language appropriate to the legal systems of the United Kingdom) they become statutory terms."

A rule of general importance in relation to the carriage of goods by air is Rule 31, which provides that in the case of combined carriage performed partly by air and partly by any other method of transport, the rules embodied in the First Schedule apply only to that part of the journey which is carried out by air and then only if such carriage falls within the terms of Rule 1. Sub-rule (2) of the same rule is in aid of parties to a contract of combined carriage. It provides that nothing in the Schedule "shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other methods of carriage", so long as the provisions of the First Schedule are observed as regards the carriage by air.

**Liabilities of carriers by air.**—The extent of the liability of an air carrier is to be found in sections 18 to 23, and 25 of the First Schedule. As these rules need to be read together they are here set out in full:—

"18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

20. (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

21. If the carrier proves that the damage was caused or contributed to by the negligence of the injured person, the Court may exonerate the carrier wholly or partly from his liability.

22. (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs.<sup>1</sup>

<sup>1</sup> By sec. 2 (5) of the Act any sum mentioned in this rule in terms of francs shall, for the purposes of any action against a carrier, be converted into rupees

Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value of the consignment at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of 65 $\frac{1}{2}$  milligrams gold of millesimal fineness 900.

23. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule.

\* \* \* \* \*

25. (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment."

The general reader might, perhaps, be pardoned if on reading through the foregoing rules he reaches the conclusion that what the Act with one hand does for those interested in the goods at risk, it carefully takes away with the other. Some further study will, however, show that there is a residue of liability from which the carrier cannot escape. He is wholly liable under Rule 25 if the damage is caused by his "wilful misconduct." But by reason of Rule 20 (2) mere negligence in pilotage or in navigation or in anything else coming within the meaning of the words "handling of the aircraft" as used in that sub-rule will not be wilful misconduct or its equivalent within the meaning of Rule 25. In other words *mere* negligence will never be enough to fix the carrier with liability. *Deliberate* negligence, on the other hand, imports quite another idea and may well be the equivalent of "wilful misconduct". Thus, for someone to know that in piloting or in handling an aircraft he is committing a breach of some rule or regulation made for the safety of what is entrusted to him for carriage might well amount to wilful misconduct in the opinion of a court of justice.

It is submitted that a deliberate breach of a duty in the sense of some wilful neglect of something which the person responsible knew ought to be done for the safety of the goods at risk would amount to wilful misconduct. It has long been accepted law both in England and India that misconduct is a term which includes acts of omission as well as of commission. Moreover, the concept of criminal negligence is one

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at the rate of exchange prevailing on the date on which the amount of damages to be paid by the carrier is ascertained by the Court.

which the Indian Penal Code itself entertains.<sup>1</sup> It would be strange indeed if conduct sufficiently negligent to bring a person within the mischief of the criminal law would not amount to wilful misconduct for the purpose of a contract of carriage. The degree to which negligence may approximate to misconduct so as finally to amount to one and the same thing has been the subject of many judicial pronouncements in India in cases of carriage of goods by railway where risk notes B or H have been relied upon as exempting the carrier in the particular circumstances. (See *East Indian Railway v. Jogpat Singh*, [1924] 51 Cal. 615; *Bengal Nagpur Ry. Co. v. Moolji Sikka & Co.*, [1930] 58 Cal. 585; *Madras & Southern Mahratta Ry. Co., Ltd. v. Sundarjee Kalidas*, [1933] 60 Cal. 996, *Secretary of State v. Allah Ditta*, A.I.R. [1930] Lah. 120; *Naurang Lal v. B.B. & C.I. Ry. Co.*, A.I.R. [1936] Pat. 84.)

But when one remembers that the Courts in England both in the 19th century and early in the present century have held this conduct not necessarily established by proving even culpable negligence (see *Glenister v. Great Western Ry. Co.*, [1873] 29 L.T. 423 and *Forder v. Great Western Ry. Co.*, [1905] 2 K.B. 532), the only summary of the legal position which it would seem safe to offer is that each case must be judged strictly on its own particular facts.<sup>2</sup>

As in contracts of carriage by railway, so the terms of contracts of carriage under the Carriage by Air Act are either wholly, or in part, to be found in the relative Consignment Note. By Rule 5 (1) every Air Carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note", and every consignor has the right to require the carrier to accept this document. Sub-rule (2) provides that the absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage "which shall, subject to the provisions of Rule 9, be nonetheless governed by the rules contained in the first schedule". If, at the request of the consignor, the carrier makes out the air Consignment Note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor. It is laid down in Rule 9, which Rule 5 (2) above alluded to thus expressly attracts, that if the carrier accept goods without an air Consignment Note having been made out, or if the Consignment Note does not contain all of the first nine particulars enumerated in Rule 8, or the last of the required particulars (namely a statement that the carriage is subject to the rules relating to liability contained in the Schedule), the carrier shall not be entitled to avail himself of any of the provisions of that Schedule which exclude or limit his liability.

A recent case in England provides an example of the effect on the contract of non-compliance with the statutory rules as to the particulars to be incorporated in the Consignment Note, and illustrates the danger of printing conditions upon such a document which are in disconformity with the intentions of the Statute. (*Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, [1936] 2 All E.R. 890.) The material facts in that case were that the Airway company sent its van to the plaintiff's office to collect a consignment of bar gold valued at a little over £9,000 for transport by air and delivery to a bank in Paris. One of the carrier's usual

<sup>1</sup> In particular, where the safety of life or limb is concerned. *Vide* sec. 304A of the Indian Penal Code (causing death by a rash or negligent act).

<sup>2</sup> But see the respective discussions of the topics of "negligence" and "misconduct" in relation to carriage by land at pp. 318 *et seq.*, *ante*.

printed consignment notes was made out and tendered. The van carried the consignment to the Croydon Airport where the box was weighed and put in the defendant's strong-room. The next morning the door of the strong-room was found open and the goods missing. The plaintiffs claimed the value of the consignment. In the action, the plaintiffs by their points of claim, took a number of alternative pleas, but went to trial (1) on the plea that the contract contained in the Consignment Note was subject to the Carriage by Air Act, 1932, and that by the terms of that Statute it was incumbent upon the defendants to set out in that note a statement that the carriage of the consignment was subject to the rules relating to liability set out in Schedule I to the Act and that the Consignment Note contained no such statement; while they relied on their alternative plea (2) that the loss of the goods was caused by the wilful misconduct of the defendants or by such default which by English law is consistent with wilful misconduct. The defendants admitted that the goods were stolen from their Airport. They pleaded certain facts to show that they took all necessary measures to prevent such a loss, or, in the alternative, that it was impossible for them to take such measures, and relied upon Rule 20 as showing that as carriers they were not liable if they established as much. By their Reply the plaintiffs alleged that a special declaration was made of the value of the goods when delivered to the defendants, and that a supplementary payment had been made. Accordingly they claimed to treat the consignment as insured by the defendants for the value named.

After setting out all the relevant rules in Chapter III of the Schedule<sup>1</sup> Lewis, J., held that the effect of them, read together, rendered the carrier *prima facie* liable for any loss caused or occasioned during carriage by air. He held secondly that the theft from the defendant's strong-room was an event occurring during such carriage as contemplated by the contract read with the statutory rules. The carrier was, however, entitled to escape his *prima facie* liability if he could satisfy the provisions of Rule 20 (1); and there was a further limitation upon his liability in so far as the amount was concerned; but the latter limitation could be avoided and the original liability restored if the consignor make a special declaration and pay the supplementary sum referred to in the relative rule. In no way could the carrier limit his liability further. (*Vide* Rule 23.) In order to limit his liability the carrier must comply with the provisions of Rule 8 expressly referred to in Rule 9. Upon the questions of fact he held that the carrier had not caused the Consignment Note to include the requisite statements mentioned in Rule 9 and consequently that no limitation of his *prima facie* liability was available to him.

The company had printed a number of general conditions on the back of their Consignment Note. These conditions were all under the general caption "*agreement concerning the contract of carriage by air*". These general conditions were posted up at the defendants' offices. The condition which came in for adverse criticism read as follows:—

"Chapter 2, Art. 4 (5). So far as concerns international carriage, as defined by Art. 1, para. 2, the air Consignment Note shall contain in

<sup>1</sup> Throughout the proceedings what in this treatise are referred to as rules and sub-rules were there referred to as articles and paragraphs. It is submitted that though in the Convention the separate paragraphed provisions are rightly to be styled "articles" they become statutory "rules" when scheduled to an Act. Indeed in the relative Schedule they are so named throughout the Indian statute.

addition the following particulars inserted by the carrier . . . . (b) a statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of Oct. 12, 1929, and upon which those conditions are based."

In the view of the learned Judge "the direction given in the schedule is a statutory obligation imposed upon the carrier to incorporate in his consignment note a perfectly simple statement, namely, 'that the carriage is subject to the rules relating to liability established by this Convention' . . . . . Those responsible for the preparation of the Consignment Note instead of having a plain statement in accordance with the Act printed on the Consignment Note, have chosen to set out that the carriage is subject, not to the rules established by the Convention, but to certain conditions which it is alleged are based on those rules . . . . . The answer to the first question is that the Consignment Note does not satisfy the requirements of Art. 8 (g) of the Convention."

Though this was sufficient to dispose of the action, the learned Judge took upon himself to deal with some of the other contentions raised by the parties. He noted that on the consignment note in a column headed "*Quality and nature of goods*" there had been inserted the words "Bar gold £9,000" and that the same figure had been filled in elsewhere, namely, in another column headed "*Value for Customs*"; that there was another space in the Consignment Note within which might be inserted a figure representing the value of the consignment for purposes of insurance. This space was headed "*Special declaration of value for insurance by the carrier*". In the Consignment Note in suit that space had not been filled in. Adjacent to that space was, however, another headed "*Special declaration of value at delivery*". That space was not usable, having been deliberately blacked out; and evidence was led in the action to the effect that Imperial Airways refused to accept any special declaration of value at delivery. The Judge accordingly held that there was no special declaration at delivery, and if such had been made on the Consignment Note the consignment would not have been accepted. He held, as a fact, that no supplementary payment had been made by the consignor. It was true that the rate paid was higher than the rate for ordinary merchandise. That was because the only rate at which bullion was carried by the defendants was an *ad valorem* rate, and this, in the opinion of the learned Judge, accounted for the value stated in the Consignment Note. There was no supplementary payment as contemplated in a contract of insurance within the rules attracted. In the result the defendants were held liable to the extent allowed by the rules under the ordinary liability created by those rules, and were condemned in the costs of the action.

The effect of that decision has been an alteration in the approved form of air Consignment Note issued by Imperial Airways which now includes the exact words of Art. 8 (g), the equivalent of Rule 8 (g) of the First Schedule of the Indian statute.

A case of perhaps even greater importance came before the King's Bench Division in 1937. (*Philippson v. Imperial Airways, Ltd.*, [1937] 3 All E.R. 318.) Here, also, the loss out of which the action arose was occasioned by the theft of gold bullion from Croydon Airport. The plaintiffs had consigned the bullion from London to Brussels. The defendants contended that Belgium was not a "High Contracting Party" to the Convention of Warsaw; that the carriage was not "international carriage" within the conditions of carriage to which the Consignment Note was subject; that the contract was not subject to the Carriage by

Air Act of 1932; that, whereas by the conditions of carriage to which the Consignment Note was subject, an action for damages in the case of international carriage had to be brought within two years, in all other cases an action had to be brought within six months, and that, as the action had been commenced later, it was barred by limitation. The Consignment Note was in the form which Lewis, J., in *Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, *supra*, had held not to comply with the rules which impose a statutory liability on the carrier by air in place of the ordinary common law liability. The plaintiffs conceded that the carriage was not "international" within the meaning of the Act. But they said that the Consignment Note was subject to terms, based upon the same principles as informed the Convention of Warsaw, namely a series of rules alleged to be binding upon members of what was styled the International Air Traffic Association (I.A.T.A.). Porter, J., held these rules to represent an agreement by individual carriers as to the terms on which they would carry, and as providing that as soon as the Convention of Warsaw should come into force, namely, 90 days after the first five ratifications, those terms should be binding on all members of I.A.T.A., whatever their nationality. He further held the word "includes" in the definitive articles (or rules) 1, 2 (2) to mean that such carriage is "international" to the exclusion of all other carriage. "It is definitive", said he, "and does not merely add something to some other vague process known as 'international carriage'". Observing that the English Act was passed in July, 1932, and came into force in May, 1933, while the contract was made in March of 1935 and before an order in council had certified Belgium as having acceded to the Convention, he held the carriage not to be international and the carrier to be protected by the terms of the contract. Both parties appealed.

The Court of Appeal (Greer, Slessor and Clauson, L.J.J.) were not unanimous. Even the majority, whilst affirming the decision of Porter, J., did not accept the learned Judge's reasoning.

On further appeal to the House of Lords ([1939] 1 All E.R. 761) the House (Lords Atkin, Thankerton, Russell of Killowen, Macmillan and Wright) was divided. The majority held the term "High Contracting Party" as used in the Convention to include signatory states, whether or not they had ratified, and also acceding states. They also held the carriage in question to be "international carriage", within the meaning of the conditions attracted by the contract. Lord Wright, who was of the majority, observed the respondents to have conceded that at least in many places in the Convention the words "High Contracting Party" must be construed as meaning "signatory", but that it was said that in other parts of the Convention they should be construed in a narrower sense, *i.e.*, as confined to a Power which has not only signed but ratified or acceded. While disagreeing with the last-mentioned view, Lord Wright regarded the matters in controversy as falling to be decided upon broader grounds. "The Court", said he, at p. 778, "is here concerned with a contract of carriage. The respondents are claiming that on a particular construction of the Consignment Note and the general conditions which it incorporates, they are entitled to limit or exclude their liability for the loss of the goods. However, they are faced by the general principle applicable to contracts of carriage—that a carrier who wishes to limit his liability must do so by plain words." Citing and applying what Lord Loreburn, L.C., had said in *Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd.*, [1908] A.C. 16 at p. 19, he reminded the House that carriers may contract themselves out of certain duties imposed by law,

but that unless they prove such a contract the duties remain; and that such a contract is not proved by producing language which may mean that, and may mean something different. A consignor is entitled to a statement of any conditions by which a carrier proposes to limit his statutory liabilities in terms sufficiently plain for the consignor to understand. He is entitled, if they are not plain, to interpret them in the sense most favourable to himself and least in favour of the carrier's exemption from liability under the contract. "That is so", said Lord Wright, "whenever the exemptions are reasonably capable of both a narrower and a wider construction". In the result the plaintiffs succeeded and Imperial Airways Limited was held liable for the loss.

**Air risks covered by ordinary insurance.**—It cannot be doubted that the carriage of goods by air is for many purposes insufficiently covered by the ordinary liability of a carrier as defined in these rules, and that many consignors must find it useful to cover their risks by insuring outside the rules, in spite of the opportunities, such as they are, of obtaining additional security by the supplementary payment required by those rules. Such insurance with a recognised insurance company of standing would obviously be of the greatest advantage in a contract of combined carriage, whether the same were international or more localised. Again, in respect of the transmission of parcels by aerial post an appropriate policy of insurance with such an undertaking is quite commonly resorted to. An example of a clause defining a risk of the last-named kind in use by an insurance company doing business in British India today is the following:—

*"Insured against actual total loss of the parcel only. This policy covers the parcel as a whole against all and every risk of land, air and water carriage, Theft, Robbery or Loss, from the time of the issue of the Registered Receipt until that of delivery of the parcel to the consignees and their signature to the Post Office but only to pay the excess of the Post Office liability."*

The above clause, or one to like effect, is commonly inserted in a policy which in its general characteristics is an ordinary marine policy. No doubt as time goes on an instrument more appropriate to air risks will be designed, where the object is to cover risks incidental only to transportation by that method. It would seem that for commercial purposes a marine policy or one on similar lines meets the everyday requirements of a contract for combined carriage by air together with one or more other methods of transport.

It may be surmised that as air transport develops, those who regularly use such methods for the transmission of goods, particularly for valuable goods, will require to be accommodated with floating policies; and there seems no reason to suppose that insurers in India will not afford facilities in that direction to reputable clients of sound financial standing.

**Transit by Post.**—In the next preceding section of this Chapter a clause was quoted from a policy having for its object the provision of cover for articles transmitted by post.<sup>1</sup> The clause contemplated the

<sup>1</sup> In early days in Europe, as in some parts of India today where communications have not been modernized, a through route for the transmission of letters or messages was divided into "stages", each of which could be covered by a runner or group of runners back and forth in a day. In Europe each such stage by road was marked with an upright pillar or "post" placed in some conspicuous position. At points of interchange, there was in later times often an inn or hostelry where refreshment and a change of horses for those driving through could be procured.

transmission being effected wholly or partly by aerial post. Thus may be introduced a brief survey of the nature of insurance business covering despatches through the ordinary postal channels, whether the actual carriage be effected by road, rail, water or air.

The Post Office in India may be described as a special department of State. Consequently, as a department, it comes today under the Central Government. Its functions and powers have been the subject of several legislative enactments in the past. Today the relative statute is the Indian Post Office Act (VI of 1898). The statute creates an official who is designated the Director-General of Posts and Telegraphs. He is the supreme administrative authority for the whole of British India. Each province, by a wise system of decentralisation, is administered by a Post-Master General subordinate to the Director. By section 75 the Central Government may, by appropriate notification, authorise, either absolutely or subject to conditions, the Director-General to exercise any of the powers conferred upon it by this Act. But by the same section Government retains, without right of delegation, all its rule-making powers. As in England, the liabilities and obligations imposed upon the State postal authorities in India would be unreasonable as well as unworkable were it not that in the transmission of letters for reward the Post Office is by statute granted a complete monopoly. In India the monopoly alluded to is the creature of section 4 of the statute. This section is followed by another expressly prohibiting the collection, carriage, tender, reception for delivery, or the delivery itself of letters, whether for reward or otherwise, on the part of the following:—

- (a) Common carriers<sup>1</sup> of passengers or goods and their servants or agents except as regards letters solely concerning goods in their carts or carriages; and
- (b) Owners and masters of vessels sailing or passing on any river or canal in British India, or between any ports or places in British India, and their servants and agents, except as regards letters solely concerning goods on board, and except as regards postal articles received for conveyance under Chapter VIII of the Act.

Chapter VIII consists of three sections dealing with the carriage of mails<sup>2</sup> by sea and the conveyance of postal articles by ships other than mail boats.

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Journeys of this kind were often referred to as "posting", and a carriage which would take one or two passengers through one or more such stages of a journey was known as a "post chaise". So "to post a letter" simply meant to send it on its way till it reached its destination. In India *Dak* Bungalows served much the same service as did the roadside posting houses in Europe.

<sup>1</sup> This prohibition is inherited from the time when it was supposed that railways in India were common carriers. As it stands today it fails to protect the Office against the direct transmission of letters by railway, whether to oblige their customers, or generally for reward.

<sup>2</sup> The word "mail" in connection with the transmission of letters may perhaps seem puzzling to the Indian student. The word originally meant "armour", i.e., a protective covering for a man's body against the attack of persons in possession of weapons. In early times those entrusted with letters whether on foot or on horse-back, had to go armed and otherwise suitably protected against robbery accompanied by violence. In course of time, armour as such died out; but by the time when the transmission of letters had become a royal monopoly, the vehicle in which the letters were carried was in England painted with the royal colours and throughout its journey was under the protection of an armed guard—latterly a single individual who carried fire-arms and who announced the arrival of the coach by the sounding of a horn. The name "mail" descended from the armed man to the armed vehicle

**Liability.**—In theory the monopoly to be enjoyed is conferred upon the Crown. And consequently persons who consider themselves aggrieved by any circumstance connected with the exercise of the statutory monopoly must sue the Crown in India. We should expect therefore, and we actually find in the statute, a disclaimer of liability save in so far as the Crown has chosen by express words in the statute to accept some measure of liability for damage or loss incurred by those who are compelled to entrust to the Crown the transmission of messages, letters or any other thing which may lawfully be accepted by the post office for carriage. The relative section is section 6 and is in the following terms:—

“6. The Crown shall not incur any liability by reason of the loss, mis-delivery or delay of, or damage to, any postal article in course of transmission by post, except in so far as such liability may in express terms be undertaken by the Central Government as hereinafter provided; and no officer of the Post Office shall incur any liability by reason of any such loss, mis-delivery, delay or damage, unless he has caused the same fraudulently or by his wilful act or default.”

**Definitions.**—Attention is drawn to the definitions which affect the subject of insurance. The meanings to be placed respectively upon the phrase “in course of transmission by post” and on the word “delivery” are set forth in section 3, the terms of which are as follows:—

“3. For the purposes of this Act,—

- (a) a postal article shall be deemed to be ‘in course of transmission’ by post from the time of its being delivered to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chapter VII;
- (b) the delivery of a postal article of any description to a postman or other person authorized to receive postal articles of that description for the post shall be deemed to be a delivery to a Post Office; and
- (c) the delivery of a postal article at the house or office of the addressee or to the addressee or his servant or agent or other person considered to be authorized to receive the article according to the usual manner of delivering postal articles to the addressee, shall be deemed to be delivery to the addressee.”

The foregoing definition is not to be found in the Post Office Guide. The following expressions, however, based upon the contents of the definitive section (sec. 2) have been embodied in the Post Office Guide. They should be carefully studied by those concerning themselves with postal insurance either under the relative Post Office rules or independently of them. The words and phrases alluded to are: “inland”, “mail-bag”, “mail ship”, “post office”, and “postal article”.

(the Mail Coach) with its guard, and so, today, to the train or ship which has succeeded to their duties. In France the guard of a train still sounds a horn instead of blowing a whistle. The Indian runner, armed with jingling bells and a spear when on postal duty, is a local survival of what at one stage or another was common the world over. By a process familiar enough to students of human speech the use of the word has been extended from the protection given to the thing to the thing protected. So, today, people often speak of “my mail” where they mean “my letters”. An Englishman “posts” his letter; an American “mails” it!

**Prohibitions.**—Among the more important provisions of the statute which may affect indirectly a contract of insurance are the prohibitions, the effect of which is to make a breach of them an illegality. Prominent among such are those embodied in sections 19 and 20 which read respectively as follows:—

"19. (1) Except as otherwise provided by rule and subject to such conditions as may be prescribed thereby, no person shall send by post any explosive, dangerous, filthy, noxious or deleterious substance, any sharp instrument not properly protected, or any living creature which is either noxious or likely to injure postal articles in course of transmission by post or any officer of the Post Office.

(2) No person shall send by post any article or thing which is likely to injure postal articles in course of transmission by post or any officer of the Post Office.

20. No person shall send by post—

(a) any indecent or obscene printing, painting, photograph, lithograph, engraving, book or card, or any other indecent or obscene article, or

(b) any postal article having thereon, or on the cover thereof, any words, marks or designs of an indecent, obscene, seditious, scurrilous, threatening or grossly offensive character."

Moreover, power is conferred upon the Central Government by section 21 to make rules specifying articles which may not be transmitted by post; prescribing conditions under which articles may be so transmitted; providing for the detention and disposal of articles in course of transmission in contravention of the foregoing rules, and regulating the covers, forms, dimensions, maximum weights, and enclosures, and the use of postal articles, other than letters, for making communications. The same section enables Government to provide for the granting of receipts or certificates of posting or delivery and for fixing the sums to be paid for such receipts and certificates in addition to any other postage due. Wide powers are taken whereby goods notified under the Sea Customs Act may be intercepted. So, too, a power is provided whereby articles received from beyond the limits of British India and suspected to contain anything liable to duty are to be handed over to the appropriate Customs authority; and, finally, by virtue of section 26 a special power is created whereby, on the occurrence of any emergency, or in the interest of the public safety or tranquillity, any postal article or class or description of postal articles may, in course of transmission, be intercepted or detained, to be ultimately disposed of in such manner as the authority or authorities named in the section and duly empowered in that behalf may determine.

The Government's rule-making powers have been extensively exercised. An example of a prohibition under one such rule which might, if pressed, have afforded a legal defence in a suit upon a policy covering carriage by post may here be cited.

Statutory Rule 27, which had been promulgated by Notification No. 766D, dated the 7th of February, 1920, read as follows: "Gold coin or bullion or both of a value exceeding Rs. 700 shall not be transmitted by post".<sup>1</sup> In *Commercial Union Ass. Co. v. Binjraj Johurmull & Others*, [1931] 1 Comp. Cas. 125; 52 C.L.J. 60; A.I.R. [1931] Cal.

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<sup>1</sup> In the revised rules in force today (June, 1939) this rule is numbered 44.

285, the material facts were that the plaintiff firm was in the habit of transmitting gold and silver by post. "It seems to have had from the defendant company, as insurers, a floating policy cast in the form of a marine voyage policy, but which was utilised as a contract of insurance covering any transmission by post, if and when declared in accordance with the terms of the contract between the parties. The relative endorsement bore the date the 13th of November, 1934. It stated that the insurance covered an item transmitted from Calcutta to Sambalpur. It gave the Post Office receipt as No. C.421 and the amount as "Rs. 1,200 gold". By the terms of the policy the method of transmission and the extent of the risk was stated as "*Registered Insured Parcel Post or Registered Parcel Post at and from Calcutta to any place in India against all risks*". A slip attached to the instrument read "*risk to commence from the time receipts for the packages are given by the Postal Authorities to the Assured and to continue until delivered by the Postal Authorities to the Addressees or their representatives*". The goods were despatched registered, but not insured. The addressee refused to accept delivery. On return to the senders the package was found to contain a piece of stone weighing some 19 tolas in all. The weight of the package on presentation at the Post Office of despatch had been registered as 53 tolas. The insurers at the trial set up a number of defences, but did not plead that the contract of carriage was illegal as contravening statutory Rule 27. On the ground that no such defence had been pleaded, the Court of Appeal seems to have declined to entertain any argument based on that aspect of the contract, and the insurers were held liable. Rankin, C.J., in the course of his judgment observed as follows:—

"The learned Judge has construed the policy to mean that, even if the loss occurred on the return journey from Sambalpur to Calcutta, the policy would cover the risk, and he does that by acceding to Mr. Chatterjee's argument that the simple English language in the slip in the Insurance Policy is to have read into it the Post Office Act and the various regulations made by the Governor-General-in-Council under that Act. I protest altogether against that idea and, were it necessary to pass an opinion upon the question, I would have the greatest hesitation in holding that this was anything more than a Policy of Insurance on a voyage from Calcutta to Sambalpur and that, if the addressee refused delivery and the event occurred that the goods to be delivered were never going to be delivered to the addressee, that does not mean that the policy is to be extended until the return journey has been made to Calcutta."

In so saying the learned Chief Justice was meeting the suggestion that a Post Office rule, whereby postal articles refused by an addressee are returned to the sender, must be treated as impliedly extending the risk under the policy so as to include such a return journey. The effect of the statutory prohibition under Rule 27 is not covered by the foregoing observations, and, as already pointed out elsewhere,<sup>1</sup> was expressly left undecided.

It is reasonably plain from the words of the judgment delivered in this case, in which C. C. Ghosh, J., concurred, that the attention of their Lordships was not directed to any of the authorities favouring the proposition that a policy unlawful in its incidents cannot be countenanced. The chain of such authorities begins early and is

<sup>1</sup> See the observations on this case at p.143, *ante*.

formidable. "If" said Lord Mansfield in *Holman v. Johnson*, [1775] 1 Cowp. 341, "from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* or from the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." Citing the foregoing passage from *Holman v. Johnson*, Lindley, L.J., in *Scott v. Brown, Doering McNab & Co.* ([1892] 2 Q.B. 724), observed "*ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."

The foregoing principles were applied in *Gedge v. Royal Exchange Ass. Corp.*, [1900] 2 Q.B. 214. In that case a Mr. Rouse and others had gone in for what they called "a spec". The speculation consisted in taking out a policy against loss in respect of the non-arrival of a certain ship at a certain port by a certain date. Mr. Rouse and his friends had, in fact, no interest in the ship or in any part of her cargo. The speculators chose a ship which, from her reported position as advertised in Lloyd's Shipping Gazette, might very likely fail to reach the destination mentioned by the given date. To use their own language it was obviously going to be "a close thing". Holding that such a policy covered nothing more than a mere bet or wager, Kennedy, J., declined to give effect to it, although the policy was a so-called "honour policy" and neither party desired to go back on the p.p.i. slip.<sup>1</sup> Naturally no illegality had been pleaded by the defendants. "It appears to me" said the learned Judge (at pp. 219 and 220) "that when upon the trial of an action the plaintiff's case, as happens here, discloses that the transaction which is the basis of the plaintiff's claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim . . . . This policy, then, being an illegal instrument—an assurance which, in the language of Grove, J., in *Allkins v. Jupe* is contrary to the direction of the statute, and so unlawful in all its incidents that the law will not countenance any part of it—I cannot give judgment on it in favour of the plaintiffs. Their Counsel argued that the illegality was not pleaded by the defendants; in my opinion that makes no difference."

The prohibitions, of which but a few have been mentioned, are extensive. The scope of the present treatise, however, does not admit of any exhaustive discussion of them. As already observed, the Post Office has made extensive use of Government's rule-making powers and has recently reviewed the statutory rules as they stood in 1926, with the result that a completely new set of statutory rules have now been issued.<sup>2</sup> For the information of the general public

<sup>1</sup> For a discussion of so-called "honour" policies, see Chapter III, pp. 69-72, *ante*.

<sup>2</sup> *Vide* Supplement to the 3rd Ed. of General Statutory Rules and Orders, 1931-35, Vol. III (1937), pp. 224-297.

these rules have been reprinted, but are seen to have been rearranged, and renumbered, and (under the name of *clauses*) are to be found in the current Post and Telegraph Guide,<sup>1</sup> which is purchasable at most post offices for the price of one rupee. The result is a code of regulations not too stable in character. The Act does not permit of any delegation of the rule-making power to the Director of Posts and Telegraphs; and certain it is that Post Office customers can never find it other than difficult to determine how far these constantly changing regulations are *intra vires* the department which issues them. This arises from the fact that in the Guide these so-called "clauses"—though often word for word a repetition of some statutory rule—do not bear the number of the rule which is thus reprinted, nor is there to be found in the Guide any reference to the relative Government notification. The difficulty is further enhanced by the fact that the statutory rules themselves derive their force from a series of notifications in no one of which is the particular section of the statute mentioned under which the rule or rules are thus promulgated.

Of equal importance with the rules or substantive provisions of the Act expressly disallowing under any circumstances the transmission of certain articles, are the rules which lay down the particular conditions under which certain specified articles will alone be accepted by the postal authorities. The more modern rules relating to such conditions have been framed to meet difficulties which experience has shown to arise the world over. The object of such conditions is, for the most part, to conserve the public safety. Hence derive the conditions relating to the carriage of various chemical substances, human excrement, the virus of such a dangerous disease as plague, and a large body of dangerous articles of which the needs of modern scientific research require the rapid and safe transmission.

The policy underlying the statutory rules, read as a whole, may be thus formulated. Liability under the act in respect of unregistered postal articles being limited to losses caused by the fraud of a postal servant or by what section 6 styles "his wilful act or default", such liability as is otherwise accepted by the Crown is graduated: firstly, by refusing to accept knowingly certain articles for transmission by post at all; secondly, by refusing others unless they be registered; and in the third place by the rule which provides that nothing will be accepted for insurance under the act which does not fall within the description of a registered letter, a value-payable registered letter, a registered parcel or a value-payable registered parcel.<sup>2</sup> The more important of the relative rules will shortly be referred to in more detail. For the moment, however, it may suffice to point out that the responsibility thus assumed by the Crown, in return for the monopoly granted and in consideration of the fees paid in respect of the transport undertaken, is extremely limited and affects but a small decimal fraction of the postal articles entrusted to its care. It is for this reason, as also because the limit of insurance under any head is Rs. 3,000, that cover from insurers independent of the Post Office is so much in request.

In order to understand precisely what it is for which the Crown will accept full responsibility as a carrier and insurer, it is necessary to form some notion of the system under which letters and parcels may

<sup>1</sup> The reference is to the edition published in September, 1938.

<sup>2</sup> *Vide* Statutory Rule 72.

be registered and a notified sum collected by the postal authorities from the addressee and forwarded by those authorities to the sender.

**Registration.**—Inland postal articles in the matter of their registration are governed by Statutory Rules 58 to 66. The additional fee is 3 annas in respect of each such article. Registration will be refused save upon prepayment of the postage as well as the registration fee. The sender is entitled to a receipt evidencing the entrustment to the Post Office authorities, which entrustment thence binds the Crown. The payment of an extra anna entitles the sender to the performance on his behalf of a further duty by the Crown, namely to obtain from the addressee, if and when the letter or parcel be delivered to him, a receipt or acknowledgment of this fact in a prescribed form, and to have such acknowledgment transmitted to him with all reasonable despatch.

It is important for the student to note that whereas registration of an ordinary letter, whether for inland or foreign delivery, is permissible but not obligatory, it is otherwise with parcels. By Rule 69 all parcels to be sent by foreign post must be registered. The fee payable is inclusive of the consideration for carriage and registration under the contract. As regards inland postage, registration is compulsory under Rule 66 in the case of (a) any parcel exceeding 440 tolas in weight; (b) any insured article; (c) any parcel addressed to a place for which a customs declaration is required; (d) any article containing postage or other stamps or labels or a cheque, hundi, bank-note, bankpost bill, bill of exchange, or the like,—if the contents are either superscribed upon the cover or are known or manifest to the officers of the Post Office owing to the transparency, insecurity, or insufficiency of the cover, or to any other cause; (e) any article bearing the word “registered” or any other word, phrase, or mark to the like effect written or impressed on the cover; (f) any registered article which is re-posted after having been delivered; (g) any value-payable article.

It is useful to remember that the expression “foreign post”, as used in the statutory rules, means the post maintained either by land or sea or by air between any place in British India or any place beyond the limits of British India at which there is an Indian Post Office, and any place beyond such limits at which there is not an Indian Post Office. It will further be of interest to the student to know that there has been established in the modern world what is called an “Universal Postal Union”, with a view to secure, as far as possible, uniformity in procedure and in rates of postage between the various countries of the world.<sup>1</sup> All the great powers and their respective dependencies have joined this union including Japan, the United States of America and the Union of Soviet Socialist Republics (in a word, Russia), as well as almost every small State. By Rule 71 facilities are given to the sender of a registered article posted in India and addressed to any country belonging to the Universal Postal Union for obtaining an acknowledgment of its delivery.

**Value-payable articles.**—In consideration of a further fee, *i.e.*, a payment over and above the postal rate and the registration fee, the sender of a letter, packet or parcel may, under the prescribed conditions, obtain an undertaking from the Crown, as carrier, not to deliver the postal article concerned unless and until the addressee shall have paid on tender of the article the sum declared by the sender to be payable

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<sup>1</sup> A list of the States which have joined the Union is printed at p. 48 of the Post and Telegraph Guide for September, 1938.

in respect thereof. The postal authorities in India, in consideration of the foregoing extra charge, contract not only as aforesaid, but to collect the sum so named and to retransmit it to the sender. The statutory rules relative to contracts of this kind are Rules 94 to 102 in respect of inland traffic, and 103 to 109 in respect of foreign postal articles. Except in the case of postal articles sent by or addressed to any Department of Government or a District, Local or Municipal Board, the amount specified for collection and remittance to the sender must never exceed Rs. 1,000. By Rule 94, which prescribes the foregoing limits in respect of inland postal articles, and Rule 103, which is the corresponding rule in respect of foreign postal services (whereby the limit is put at Rs. 400 in the case of the British Isles, Kenya, Uganda, Tanganyika Territory and Iraq, and Rs. 600 elsewhere), there is a common proviso forbidding the despatch, by this method, of coupons, tickets, certificates or introductions designed for the sale of goods on what is known as the "Snowball system". For the purpose of ensuring that the Post Office does not by these facilities unwittingly aid in the perpetration of a fraud on an addressee, important rules have been promulgated, namely Rule 95 in respect of inland and Rule 104 in respect of foreign postal articles, to the following effect:—

"No such postal article as aforesaid shall be accepted at any Post Office for transmission by post as a value-payable postal article unless the sender declares that it is sent in execution of a *bona fide* order received by him. At any Post Office notified from time to time in this behalf by the Director-General, the sender shall, in addition, be required to declare that the article is one the transmission of which by post as a value-payable postal article is permitted. No postal article as aforesaid shall be accepted at these offices without such further declaration."

"*Explanation.*—An article may be sent by the value-payable post<sup>1</sup> even though it possesses no intrinsic value. Thus, legal documents, bonds, policies of insurance, promissory notes, railway goods and parcel receipts, bills of lading or ordinary bills for collection may be sent as value-payable postal articles. In the case of a railway receipt or bill of lading sent as a value-payable postal article it will be sufficient for the purposes of this rule if the article to which the railway receipt or bill of lading relates, has been sent in execution of a *bona fide* order. In the case of the other documents specified the document must be sent in execution of a *bona fide* order to send the document itself."

**Limitation.**—A further important provision is contained in Rule 102 as affecting inland postal articles. It is in the following words:—

"102. The Government shall not incur any liability in respect of the sum specified for remittance to the sender in respect of a value-payable postal article unless and until that sum has been received from the addressee and unless a claim for that sum has been preferred within one year from the date of posting of the article."

By Rule 109 the above rule is made to apply to foreign traffic also. Thus any claim becomes barred by limitation within a year of the date when the contract of carriage became effective.

**Foreign articles, fraud.**—The group of rules (103–109) relating to foreign postal articles is of considerable importance. One relates to

<sup>1</sup> Commonly known and referred to, even in official correspondence, as "V.-P. post".

complaints on the part of addressees that the facilities accorded to the sender of a particular parcel are being, or have been, used fraudulently. It indicates that the action to be taken by Government will be to restore the *status quo ante*, leaving the aggrieved party to pursue such legal remedies as he may be advised. The relative rule, which is numbered 108, is in these words:—

"108. If a complaint is made by the addressee immediately after the receipt of a value-payable postal article, that it was sent dishonestly or fraudulently the Postmaster-General may, if satisfied that there are *prima facie* grounds for believing that the value-payable postal article was sent with the intention of defrauding the addressee, withhold the payment to the sender of the money recovered from the addressee. If, after making such enquiries as may be necessary, he is fully satisfied that the value-payable postal article was sent with this intention he may order the return of the article to the sender and refund to the addressee the sum of money recovered from him on delivery of the value-payable postal article.

"*Exception.*—This rule does not apply to value-payable parcels exchanged with Great Britain and Northern Ireland, the Irish Free State, Kenya, Uganda, Tanganyika Territory, the Straits Settlements, the Federated Malay States, Johore or Kedah."

The scope of this treatise does not permit an examination of all the rules relating to the two topics of registration and the collection of money under the value-payable facilities. What is aimed at is the presentation of the more important features of the contract between the sender and the carrier in the foregoing respects, since no other kind of postal article than those which have been registered may be insured at all with the Post Office authorities. The reader's attention will now be directed to the statutory provisions concerning insurance with those authorities.

**Statutory rules as to Insurance.**—Prominent among the subjects for which a rule-making power is expressly conferred upon the Central Government is the insurance of postal articles. This power is created by section 32 of the Act. It is one of four sections (sections 30–33) all of which are concerned with the topic of insurance. The enabling section is section 30 which is in these words:—

"30. The Central Government may, by notification in the Official Gazette, direct:

- (a) that any postal article may, subject to the other provisions of this Act, be insured at the Post Office at which it is posted, against the risk of loss or damage in course of transmission by post, and that a receipt therefor shall be granted to the person posting it; and
- (b) that, in addition to any postage and fees for registration chargeable under this Act, such further fee as may be fixed by the notification shall be paid on account of insurance of postal articles."

Of equal, if not added, importance is the power taken to compel the insurance of certain things. This is by virtue of section 31 which reads as follows:—

"31. The Central Government may, by notification in the Official Gazette declare in what cases insurance shall be required, and direct that any postal article containing anything required to be insured, which has been posted without being insured, shall be returned to the

sender or shall be delivered to the addressee, subject to the payment of such special fee as may be fixed by the notification:

Provided that the levy of such special fee as aforesaid shall not impose any liability upon the Central Government or the Secretary of State in respect of the postal article."

The rule-making power is controlled by the provisions of section 32. This section reads:—

"32. (1) The Central Government may make rules as to the insurance of postal articles.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) declare what classes of postal articles may be insured under section 30;
- (b) fix the limit of the amount for which postal articles may be insured; and
- (c) prescribe the manner in which the fees for insurance shall be paid.

(3) Postal articles made over to the Post Office for the purpose of being insured shall be delivered, when insured, at such places and times and in such manner as the Director-General may, by order, from time to time appoint."

The liability assumed by the Crown in respect of postal articles insured in accordance with the statutory rules is the subject of a separate section. This is section 33 which is in the following terms:—

"33. Subject to such conditions and restrictions as the Central Government may, by rule, prescribe, the Central Government shall be liable to pay compensation, not exceeding the amount for which a postal article has been insured, to the sender thereof for the loss of the postal article or its contents, or for any damage caused to it in course of transmission by post:

Provided that the compensation so payable shall in no case exceed the value of the article lost or the amount of the damage caused."

**Postal Insurance Rules.**—The basic statutory rules governing the insurance of "inland" postal articles are Rules 72, 73, 75, 80, 81 and 82.

They do not readily admit of compression and are subject to frequent alteration. They need to be constantly checked with reference to the contemporary Post Office Guide.

The rules relating to the insurance of foreign postal articles are Rules 84 to 93. Under the current (1939) rules senders in India are not permitted to insure postal articles for countries other than are from time to time notified by the Director-General who, by Rule 84, is also permitted to notify the limit of the cover provided by such insurance. The same rule provides that the value declared for purposes of insurance and the cover which is based upon it shall not exceed the real value of the property at risk. Thus are attracted principles concerning "valued" policies, and the methods of determining value for the purposes of such insurance which have been dealt with earlier in this treatise. As in the case of inland postal insurance, prepayment of all the charges is compulsory. So, too, the sender becomes entitled to a receipt for the article accepted for insurance. Stipulations as to packing are contained in Rule 87, and in the rule which follows directions are

given as to the manner of addressing the postal article which it is sought to insure. By Rule 89 the Director-General is empowered to prescribe forms which senders may be obliged to complete, so as to give the requisite information required by the department. It is submitted that wrong or misleading information conveyed by the manner in which any such form may have been completed by the sender might well be held, on contest, to vitiate the contract of insurance.

The conditions under which the Government of India accepts responsibility in respect of a foreign postal article are made the subject of Rule 91, which in its present form was promulgated in October, 1935. It consists of 7 sub-rules, by the last of which it is expressly stated that Government does not accept any liability to the sender or to the addressee other than that mentioned in the course of the first 6 sub-rules in respect of loss of an insured inward or outward foreign letter, box or parcel, or the abstraction of, or damage to, the contents thereof. The sub-rules alluded to are thus of no small importance. They read as follows:—

"91. (1) When a foreign letter or box or a foreign parcel, not being a parcel addressed to a prisoner of war or to an Information Bureau established for prisoners in a belligerent country or in a neutral country which has received belligerents in its territory or to a belligerent interned in a neutral country, has been posted in and insured by an Indian post office within or without the limits of British India, and when such letter, box or parcel has been lost or the contents thereof have been abstracted or damaged in the course of transmission by post, compensation, not exceeding the amount for which such letter, box or parcel has been insured, shall be payable, in accordance with and subject to the provisions of sub-rules (2), (4) and (5) on account of such loss, abstraction or damage, to the sender, except in the case of a parcel in respect of which the Administration of the country of destination decides to pay compensation to the addressee under the same conditions as those prescribed in respect of the Indian Post Office in sub-rule (3)."

"(2) Whether or not the addressee has made reservations on taking delivery of a letter or box, the contents of which have been abstracted or damaged or has, after taking delivery thereof, immediately made a complaint of abstraction or damage to the Administration of the office of delivery and proved to the satisfaction of that Administration that the abstraction or damage took place before the delivery, the compensation payable under sub-rule (1) shall be payable to the sender and no claim for the payment of compensation to the addressee shall be entertained."

"(3) When an inward parcel insured by a foreign Administration is lost or the contents thereof are abstracted or damaged, compensation shall be payable by the Indian Post Office to the addressee up to an amount not exceeding that for which it has been insured if he claims such compensation after having made reservations in taking delivery of the parcel or if he furnishes proof that the sender of the parcel has waived his rights to such compensation in the addressee's favour."

"(4) The compensation payable under sub-rules (1) to (3) shall in no case exceed the value of the article lost or the amount of loss occasioned by the abstraction of, or damage to, the contents of the article, and loss of profits or other indirect loss shall not be taken into consideration in the assessment of such compensation."

- “(5) No compensation shall be payable under sub-rules (1) to (3)—
- (a) where the loss or damage has been caused by the fault or negligence of the sender, or arises from the nature of the article;
  - (b) where the insurance has been fraudulently made for a sum above the real value of the contents, or there has been any other fraud on the part of the sender or the addressee;
  - (c) where the insured article has been delivered to the addressee, or where the article is returned to the sender, and the addressee or sender, as the case may be, has signed and returned the receipt therefor without protest, or in the case of an insured letter or box, without immediately making a complaint of abstraction of or damage to the contents of the letter or box to the Administration of the office which delivered the article and proving to the satisfaction of that Administration that the abstraction or damage took place before the delivery of the letter or box;
  - (d) where the sender has not given intimation of the loss, abstraction or damage within one year following the day of posting;
  - (e) where the loss, abstraction or damage was due to improper or insecure packing;
  - (f) where there is no visible damage to the cover or seals;
  - (g) in cases beyond control (e.g., tempest, shipwreck, earthquake, war, etc.);
  - (h) where the insured article cannot be traced in consequence of the destruction of the documents relating to it from causes beyond control unless proof of liability of the Post Office to pay compensation in respect of the article has been furnished otherwise;
  - (i) where the insured article contained anything the transmission of which by the letter or the parcel post, as the case may be, is prohibited;
  - (j) where the insured article is seized by the customs on account of false declaration of its contents.”
- “(6) In the following cases, namely:—
- (a) when an insured letter or box is lost or its contents are wholly destroyed;
  - (b) when an insured parcel is lost or destroyed or its contents are wholly abstracted;
  - (c) when, by reason of damage attributable to the postal service the addressee refuses to take delivery of an insured parcel; the sender of such letter, box or parcel, shall be further entitled to a refund of the expenses of transmission, and, when an error on the part of the Post Office gives rise to enquiry as to the disposal of such letter, box or parcel, to a refund of any fee paid on account of such enquiry, but the sender of such letter, box or parcel shall in no case be entitled to a refund of the fee paid for insurance.”

The particular group of rules having for their subject-matter the insurance of foreign postal articles concludes with appropriate provisions to meet cases where the parcel is addressed to some country or place to which insurance is not available. Thus under Rule 92 (1) the insurance will attach in respect of the inland transit across British India only, where the article sent, though permissible by registered letter, is not

insurable as the contents of a parcel under the relative postal regulations affecting the transit outside British India. Yet another case, which falls to be dealt with under this group of rules, is where a foreign registered letter containing coin, bullion, platinum, precious stones, jewellery or articles of gold or silver is received from a foreign country *uninsured*. In such circumstances the Indian Post Office treats it as insured from the moment it arrives at the Indian frontier, but as insured only in respect of its inland transit within the limits of British India. The addressee in India, by virtue of the relative rule, which is 92 (4), can only obtain delivery on payment of the requisite fee. The same sub-rule contains a proviso that the insurance so compulsorily attaching to the transit through British Indian territory does not exceed the maximum limit of value for which an inland letter may be insured.

Lastly, by Rule 93 it is provided that where an insured foreign parcel, which has been re-directed or returned as undeliverable, is received back in India, and rendered subject to a fresh insurance fee by reason of its having been so re-directed or returned, such fee shall be recoverable on delivery to the sender as if it were "postage" under the Act.<sup>1</sup>

**Summary.**—It is submitted that contracts of insurance effected with the Post Office under the statute read with the statutory rules will be subject to the general and special law of insurance as the same obtains in British India today in respect of all other contracts of non-marine insurance. In this view of the matter what is styled in the statutory rules an insurance "fee" is to be regarded as the "premium"; any form filled up by a sender as a proposal; and the giving of the receipt by the postal authorities to such sender, as an acceptance of the proposal. The contract, it is submitted, will be illegal or the reverse according as there is or is not an attempt on the part of the sender to transmit something which the statute or the statutory rules forbid. On contest, it will be a question of construction of the relative documents whether the sender had warranted the truth of any assertion on his part which the document or documents disclose as having been made by him or by someone on his behalf under circumstances binding upon him. With regard to the numerous conditions set forth in the statutory rules and in the Post and Telegraph Guide it must be a question of fact whether, if breach of any such condition be relied upon by the insurer, the particular condition was brought to the sender's notice in such a manner as to be binding upon him in relation to the contract. As to whether some of the regulations figuring in the Post and Telegraph Guide have any statutory authority may well be in controversy in particular instances if the point be taken. Promptitude in the making of claims is rendered imperative by the short time left open by Rule 102, which is one year.

## 7. *Guarantee Insurance.*

**Preliminary.**—The reader will recollect from what has earlier been pointed out in this treatise that the modern English words "guarantee" and "warranty" derive from the same idea and even from one and the same early French word.<sup>2</sup> For the doctrines underlying

<sup>1</sup> These rules must not be supposed to be essentially any more stable than are those which deal with inland postage. Constant check with the contemporary Post Office Guide is essential if those interested are not to be misled. The present (1939) rules, set out above, are given merely as indication of present day postal policy.

<sup>2</sup> See Chapter II, p. 38, n. 3, *ante*.

the concept of guarantee, as the same has been expressed in the Indian Contract Act, the reader is referred to what has been said upon that subject in Chapter III of the present treatise.<sup>1</sup> It is not proposed to repeat those observations here. It must suffice to remind the reader that an insurer undertaking the class of business styled "guarantee" business, including "fidelity guarantee" business, places himself in contemplation of the general law of contract in the position of a surety; while under the special law which is attracted by all the stipulations which a modern guarantee policy contains, he makes himself answerable for an indemnity in such a manner as brings him within the law relating to insurance. In some types of guarantee business, which modern insurance companies undertake, the relative instrument is a simple bond in respect of which the insurer becomes the obligor, as where the insurer is accepted as security for someone answerable to a court of justice. Policies<sup>2</sup> of guarantee so called, such as are now-a-days commonly used to provide indemnities against breaches of contract, and of contracts of service in particular, require a different kind of instrument. In general they are framed to accord with the traditional form of commercial guarantee bond, commencing with an expression of the consideration and continuing with apt words expressive of agreement to indemnify the person who in an ordinary contract of guarantee is styled the "creditor".

Modern life presents numerous opportunities to insurance companies who are prepared for suitable premiums to enter into agreements affording indemnification against loss consequent upon failure to meet contractual obligations, or to perform duties the neglect of which may result in damage. Prominent among such occasions is the due performance by a contractor of a contract for public works (*e.g.*, *Mayor of Kingston-upon-Hull v. Harding*, [1892] 2 Q.B. 494, C.A.). A common form of guarantee insurance is one in respect of the due performance by tenants of their obligations to their landlords. Guarantees of this character have been common in India for a long time. Thus, in *Khatun Bibi v. Abdullah*, [1880] 3 All. 9, what was guaranteed was the re-delivery of farm stock in good condition at the end of the term. Of subjects appropriate for a contract of guarantee, the due performance by a servant of his duty to his master, where that duty involves control over money or other forms of easily convertible property, was, historically speaking, one of the earliest to attract the attention of professional insurers. The student must understand that, in taking up such business, modern insurers are doing no more than private individuals were content to do in the past. As trade and commerce advanced, became extended, and took on more complicated forms, the number of persons upon whose integrity the success of business undertakings ultimately depended enormously increased: such increase being wholly incommensurate with the number of private persons who could be found either willing or competent to afford personal guarantees on behalf of those so employed. Moreover, by the first half of the 19th century mercantile communities in all the principal cities of the world had gained sufficient experience of the skill and ingenuity of educated criminals to realise the necessity of providing themselves with some form of insurance against losses by fraud on the part of employees. Thus came into being Fidelity Guarantee as a definite branch of insurance business. Though in India such business may be said

<sup>1</sup> Pages 57-66, *ante*.

<sup>2</sup> For a discussion of the law of guarantee under the Indian Contract Act, see Chapter III, pp. 54-66, *ante*.

to be still in its infancy, insurances of this nature are almost universal elsewhere ; and it is a class of business which in India is evidently destined to increase.

The guarantee offered to an employer may be in respect of the integrity of, or for the due performance of his duties by, a single servant, or it may embrace a complete staff or establishment. Cover so extensive is styled "collective" fidelity insurance.

The nature of fidelity guarantee business is sometimes distinguished from the kind of insurance which has been discussed in the foregoing pages of this chapter by pointing out that, whereas in most forms of insurance against loss by dishonesty it is the crime itself, and not the identity of the criminal, which entitles the assured to claim under the relative policy, in the case of fidelity insurance the identity of the criminal is of the first materiality, inasmuch as it is only a criminal or neglectful act (as the case may be) on the part of the named individual whose integrity or whose due performance of his duty is guaranteed, which is within the policy.

**Fidelity Guarantee.**—The name "fidelity guarantee" distinguishes that class of business which is concerned with a person's integrity from that which is concerned with losses consequent upon mere negligence. In the majority of such guarantees the risk assumed concerns the fidelity of servants.<sup>1</sup> To appreciate his risk the insurer needs to be satisfied upon a number of subjects. For example, it is of importance for him to realise the nature and extent of the servant's opportunities for dealing dishonestly with his master's property. It is of equal importance to know the nature of the checks which as a matter of routine may be in existence for the early discovery of dishonest dealings, and to form some estimate of the efficiency of the system employed. It is essential, also, to discover as much as can be discovered of the servant's antecedents and of his social and financial reputation. Nor can the opinions formed by independent and reputable persons as to the man's character be neglected, where such opinions purport to be based on personal acquaintance over a sufficient period and are available. Inasmuch, moreover, as criminal ingenuity has evolved more than one method of making money by means of fidelity guarantees collusively and fraudulently obtained, reliable information concerning the antecedents and standing of the master often prove as essential as is the corresponding information relating to the man. Accordingly we find modern business talents to have designed appropriate methods for obtaining the requisite data upon which to form some estimate of the risk which the insurer is asked to cover.

To serve the foregoing objects modern insurers dealing in this class of business have been steadily improving the forms in which their preliminary enquiries are cast and the character of the conditions upon which they insist as terms of the relative contracts.

In the early days of fidelity guarantee business insurers discovered the law to be not so helpful as they seem to have expected. For instance, an ordinary contract of guarantee is not within the rule as to *uberrima fides*. This means that the rule as to disclosure does not go beyond what obtains in relation to any other contract in such matters as misrepresentation and fraud. The Indian Contract Act, however, as already

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<sup>1</sup> Using the word "servant" in its widest sense, i.e., of those who are not their own masters.

pointed out earlier in this treatise, embodies in one of the sections expressly concerned with contracts of guarantee the equitable doctrine that where the creditor has obtained a guarantee by means of keeping silent as to material circumstances the surety may avoid the contract.<sup>1</sup> Again, it was found that an alteration in the routine methods adopted by the master in the way of precautions against dishonest dealings would not, unless the contract expressly provided otherwise, preclude the master from recovering under a guarantee policy. (*Benham v. United Guarantee and Life Assurance Co.*, [1852] 7 Exch. 744; *Towle v. National Guardian Assurance Society*, [1861] 30 L.J. (Ch.) 900.) It was to overcome difficulties of this kind, especially so as to obtain the fullest possible disclosure of material facts and to provide the greatest measure of protection against an alteration of the risk, that the more or less standard conditions which govern modern fidelity insurance have been designed.

**The risk.**—The risk being dependent upon opportunity, an accurate description of the risk is as much an essential feature of the contract in this form of insurance as it is, for example, in fire or burglary insurance. The description must, therefore, include not only a statement of the servant's position in relation to his employers, but a clear indication of the nature and scope of the duties which are, or may be, assigned to him under the terms of his contract of service. Without such a description, accurate in all essential features, it were impossible for the insurer to avail himself of the well-settled doctrines concerning an alteration in the risk he contracts to run. Thus, if after the risk has attached under the policy, the servant be employed in a different capacity, or be called upon to perform duties other than those contemplated by the contract of insurance, the risk ceases to attach. (*Cosford Union v. Poor Law, etc., Officers' Mutual Guarantee, etc.*, [1910] 103 L.T. 463; *Wembley U.D.C. v. Poor Law, etc., Officers' Mutual Guarantee, etc.*, [1901] 17 T.L.R. 516.)

**Time factor.**—The early cases treated as quite irrelevant the date on which an act of dishonesty of the kind contemplated by the guarantee may be discovered. It did not matter, therefore, if the period covered by the guarantee had run out before any such act of dishonesty came to light: the right to enforce the indemnity depending not upon any such circumstance, but upon proof that the act itself had been perpetrated during the currency of the guarantee. (*Ward v. Law Property Assurance & Trust Society*, [1856] 4 W.R. 605.) Correspondingly, if the act of dishonesty took place prior to the contract of guarantee, but came to light during the currency of that guarantee, the risk would not attach. (*Allis-Chalmers Co. v. Fidelity and Deposit Co. of Maryland*, [1916] 114 L.T. 433, H.L.) It is, of course, otherwise if the policy expressly condescends to cover losses discovered during its currency even if the act or acts occasioning them occurred earlier. In *Pennsylvania Co. for Insurances on Lives, etc. v. Mumford*, [1920] 2 K.B. 537, C.A. the relative words in the policy sued upon read as follows:—

"All such direct losses as they may during the space of 12 calendar months from noon of the 30th of September 1916 to noon of the 30th of September 1917 discover that they have sustained in manner hereinafter mentioned, that is to say . . . ." The insurers were held not liable in that case for reasons quite disconnected with the foregoing words in the policy,

<sup>1</sup> See Chapter III, p. 61.

namely, that the events which culminated in the losses were not themselves within the description of the risks assumed.<sup>1</sup>

**Consideration.**—This is often expressed as the payment of the first premium. It is rare to find a bare "promise" to pay the premium treated as the consideration for the guarantee. Such a promise, however, would under the Indian Contract Act be sufficient to bind the surety, whether the latter be a private individual or a joint-stock company holding itself out to do this class of business. Often enough it is a term of a servant's contract of service that he obtain a sufficient guarantee. The stipulation may name a particular insurance company for the purpose. In such cases it is not infrequently the servant who himself is called upon to pay the first premium and to keep up the policy.

As, however, the indemnity which it is the prime object of the policy to secure is payable to the master, a policy recognising payments of premium by the servant usually reserves to the former a power to keep up the premiums on the servant's default.

In 1896 the point directly arose as to how far a receipt given to a servant for payment of premium under a fidelity guarantee policy on his own integrity was binding upon the insurers. (*Re Economic Fire Office Limited*, [1896] 12 T.L.R. 142.) It appeared that one Goodyer was a traveller in the employment of a certain firm (the plaintiffs in the case). It was a term of Goodyer's contract of service with his employers that he should obtain a fidelity policy and himself keep up the premiums. The evidence disclosed that Goodyer "borrowed" from one Bartlett, who was the insurer's agent at Nottingham, a sum sufficient to pay a premium then due, and that Bartlett had given him a receipt as for the insurers; that it was within the scope of Bartlett's authority to collect premiums as they fell due and to grant receipts in the name of the company; that Goodyer, however, did not repay the money treated as "lent", and that Bartlett had paid nothing on Goodyer's behalf to the company. Consequently the company had not, in fact, received the premium. Goodyer shortly afterwards absconded, and his employers made a claim against the insurers. But in the meantime the latter had gone into liquidation. The firm then took steps to prove their claim in the winding-up proceedings. In allowing their claim Vaughan Williams, J., held that justice and commercial practice required that after the granting of the receipt the company could not be allowed to dispute the claim. "There was clearly an estoppel, because the act of giving the receipt was an act done by Bartlett within the scope of his ostensible employment: that employment which he was held out as possessing."

**Fidelity insurance and ordinary guarantee.**—The fact that the consideration, namely, the payment of premium, is a monetary consideration, constitutes one of the distinguishing features between guarantee insurance and an ordinary tripartite contract of guarantee: for in the latter case the guarantor or surety does not receive any monetary consideration for undertaking the risk. There are other distinguishing features in the legal relationships thus created. The guarantor under an ordinary contract of guarantee becomes surety for the debt. An insurer under a fidelity policy does not. He is, in fact, not in strictness

<sup>1</sup> The material facts in this case are of peculiar interest to students of fidelity insurance. They have, however, been fully described and the *ratio* of the concurrent judgments discussed earlier in the present chapter (see p. 306, *ante*). The scope of this work does not admit of their repetition here.

a surety at all. (*Dane v. Mortgage Insurance Corporation*, [1894] 1 Q.B. 54, C.A., per Lord Esher, M.R., at p. 60.) What he contracts to do is to indemnify his assured against losses arising in agreed circumstances and under agreed conditions. Thus his obligations, though there may be an express monetary limit upon them, cannot be defined in terms of money until some event contemplated by the policy shall have occurred and loss have resulted. (*Finlay v. Mexican Investment Corporation*, [1897] 1 Q.B. 517, 522; *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617, 630.) Moreover, whereas in a simple contract of guarantee the surety has a direct right of action against the debtor whose debt he has paid, an insurer under a guarantee policy has no such right. He may, of course, succeed to some extent in recouping himself for what he has paid out: but for that purpose he must be so circumstanced as to be able to avail himself of the doctrine of subrogation.<sup>1</sup> He has no right of action against the debtor.

Nice questions sometimes arise as to the real nature of the particular contract which it is sought to enforce. On contest the Court must determine the intentions of the parties as best it can. Naturally the instrument itself will be looked at. But its apparent form will not be conclusive. What may appear at first sight an ordinary guarantee may finally be construed as a policy of insurance; what may bear the title of a policy of insurance may yet turn out, on a proper interpretation, to be a contract of suretyship and no more. In the leading cases of *Seaton v. Heath*, *Seaton v. Burnand*, [1899] 1 Q.B. 782, Romer, L.J., pointed out that many contracts might with equal propriety be called either contracts of insurance or guarantee; while there is considerable authority for the proposition that in many cases it is immaterial whether the contract belong to the one category or to the other. (*Dane v. Mortgage Insurance Co.*, *supra*, at p. 62; *Liverpool Mortgage Insurance Co.'s case*, *supra*, at p. 636; *Seaton v. Burnand*, *supra*, at p. 148.)

Where the insurers are able to establish that the contract was intended by the parties to be one of insurance and not one of simple guarantee they obtain, altogether apart from any special stipulations in that regard, the advantage of the doctrine of *uberrima fides* (the rule of utmost good faith) which, as already observed, does not govern the ordinary contract of guarantee.

**Cause of action.**—Guarantee business is a class of insurance in which exactitude in describing the risk is of the first importance; for both parties are concluded by the description. Where the risk is expressed widely, as by such a phrase as "*fraud or dishonesty*", no trouble can now-a-days arise, since it has been long-settled law that these words are to be construed in their plain and ordinary connotation; so that conduct which the ordinary business man would regard as dishonest will be within the policy. On the other hand, if the risk be described with reference to a particular crime, nothing short of conduct which would suffice to bring the perpetrator thereof within the mischief of the criminal law thus attracted will give a cause of action under the policy. Nor can the assured recover in such a case unless he establishes affirmatively that the technical offence charged has, in fact, been committed. To do so the evidence must not fall short of what would be required to bring the offence home to the same individual if the latter were put upon his trial. (*Debenhams, Ltd. v. Excess Insurance Co., Ltd.*, [1912] 28 T.L.R. 505.)

<sup>1</sup> As to which see Chapter III, pp. 72-77.

The reader's attention has already been directed earlier in this chapter to the dangers attendant upon describing risks in quasi-technical language and the advantage, on last analysis and where the intention is to limit the risks to specific acts of dishonesty, in describing those risks in terms of the particular criminal law applicable. It is not intended to repeat those observations here. It is submitted that the same considerations apply to those risks which are assumed in fidelity guarantee insurance.

The facts in two leading cases will, without departing from the scale of this work, suffice to give the student reader concrete examples of what will lie outside the scope of an ordinary fidelity guarantee policy, unless specially provided for by means of apt words. In *Walker & Ors. v. British Guarantee Assocn.*, [1852] 21 L.J.Q.B. 257, the condition of the relative instrument (described as a bond) was expressed in these words: "*That James Jones should duly and faithfully discharge the duties of his office of treasurer to the building society, and obey the directions of the trustees, and duly account to the trustees for money, goods and chattels which he might receive on account of the trustees.*" It was alleged that having received £170, the monies of the society, he ought, according to the rules, to have paid over the same to the credit of the society with their bankers at latest during the day following upon the receipt of this sum; that he had failed to pay in the said monies or any part thereof, whereby the whole sum became lost to the society. It was common case that the position of the said Jones was that of a bailee of the monies. The defence was that after he had received the monies, and before the time when he ought to have paid or could have paid the same to the bankers, the said Jones, "without any default or negligence or want of due care on his part, was robbed by violence of the whole of the said monies". On a trial by jury this plea, namely that he had parted with the monies by irresistible violence, was found as true. In support of a Rule to enter judgment for the plaintiffs, their counsel argued that the doctrine of *vis major* was inapplicable: putting his case so high as to contend that if a bailee while carrying such a sum of money in a bag, were, as the result of an earthquake, to lose the bag and its contents, he would still be a debtor for the money to those who had entrusted him with it. The Court declined to accept such a doctrine, and held the bailee to have been discharged by the robbery. "If this were not so" said Lord Campbell, C.J., in delivering the judgment of the Bench, "his liability would be greater than that of a common carrier; for he would not even be discharged by an Act of God or of the Queen's enemies." In the result, therefore, the loss, being in no way the result of the servant's default, was outside the scope of the policy and the claim against the insurers failed.

In *Cosford Union v. Poor Law & Local Government Officers' Mutual Guarantee Assocn., Ltd.*, [1910] 103 L.T. 463, the facts were that one "A" had been appointed an assistant overseer of a certain parish. This appointment made him *ex officio* clerk to the parish council by virtue of the provisions of section 17 (2) of the Local Government Act, 1894.<sup>1</sup> The defendants guaranteed the faithful performance by "A" of his duties as assistant overseer of the parish. Eventually it was discovered that during the currency of the guarantee "A" had embezzled certain monies which he had received as clerk to the parish council. It was held that the guarantee was only in respect of his integrity as assistant overseer,

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<sup>1</sup> 56 & 57 Vict., c. 73.

and consequently that his dishonesty as clerk to the parish was outside the scope of the guarantee and the defendants were under no liability.

**Servant procuring the Insurance.**—Where a servant, or would-be servant, procures from insurers a fidelity guarantee bond or policy in order to retain or secure a particular employment, nice questions have arisen as to the application of the rule of good faith in the matter of disclosure. For example, where the employee obtains such a guarantee of his own integrity the benefit of which, namely the indemnity payable thereunder, will be available to his master, is he the agent of that master? For if he be, and he fail to disclose facts material to be known to the insurers, would such non-disclosure be deemed non-disclosure on the part of the master, where the master in fact does not know the material matter and the servant does? This question was agitated in *Comptoir Nationale v. Law & Co and General, etc.*, in 1908, in the Court of first instance; and 1909, in the Court of Appeal.<sup>1</sup> The material facts in that case were that a firm of merchants ("O" Brothers) were under contract with the Government of Denmark for deliveries of coal. The plaintiffs were bankers, and they had made certain advances to "O" Brothers in aid of the performance of that contract. Later the plaintiff bank refused to make further advances without security; whereupon "O", one of the partners of the firm, undertook to procure and did procure a policy from the defendants, whereby the latter guaranteed the plaintiff bank against loss consequent upon "O" Brothers failing to fulfil their contract with the Danish Government. "O", during the prior negotiations which resulted in the issue of the policy, made a false statement as to his own financial position. Eventually the bank sued on the policy and the insurers sought to avoid their liability on the ground of "O's" misstatement: contending that the person who thus procured the policy the indemnity under which was to be available to the bank must be regarded as the bank's agent. The judge of first instance, Bray, J., disposed of that contention in language which is worth preserving. "It was" he said "'O's' affair to get this policy. He wanted it in order that the advances might be continued. He could go to what insurance company he liked, provided the policy eventually turned out satisfactorily; it was quite immaterial to the plaintiffs what premium he gave or agreed to give, quite immaterial what the conditions were, provided the policy, when it was produced, was a satisfactory one, and therefore it seems to me that it would be entirely wrong to conclude from this that the plaintiffs constituted 'O' their agent. No authority was cited for that proposition except the case of *Wheelton v. Hardisty*,<sup>2</sup> which really did not decide anything of the kind, but hinted that, under certain circumstances, a person who negotiated might be the agent of the person in whose favour the policy was eventually given; but it did not say under what circumstances, and no opinion was expressed at all and no authority, except that one was cited, and I know of none for that proposition. But there is a very familiar case that arises every day: A man is asked to lend money, and the proposed lender says, 'I must have a guarantee or security'. 'Very well', says the intending borrower, 'I will try and get one', and thereupon he may bring either the surety himself, or he may bring a document signed by the surety. Is the debtor or intending borrower the agent of the lender to make representations? Surely not."

<sup>1</sup> A summary of this otherwise unreported case will be found in Macgillivray, *op. cit.*, 2nd Ed., p. 504.

<sup>2</sup> [1857] 8 E. & B. 232 (policy of Life Insurance).

This judgment was affirmed, as also the reasoning which lay behind it, by a strong court of appeal. (Vaughan-Williams, Buckley and Fletcher-Moulton, L.JJ.)

**Duties devolving on the Assured.**—Once a fidelity policy, or even a cover-note with like intent, has been issued, what duties, if any, devolve upon the person or firm who in the events contemplated will be indemnified under the policy? Must such an one keep a close watch upon the servant or other person whose fidelity is guaranteed? The answer is that, apart from any special stipulation in the policy, he need not. (*Guardians of Mansfield Union v. Wright*, [1882] 9 Q.B.D. 683.) Even where the employers had failed to comply with the requirements of a particular statute as to the supervision of their employees such failure has been held in Canada to be no defence to an action on the policy. (*London Guarantee & Accident, etc. v. City of Halifax*, [1927] Can. S.C.R. 165.) Again, suppose the master becomes suspicious of the servant, is it the former's duty to communicate his suspicions to the insurer? The answer is, it is not.<sup>1</sup> (*Ward v. Law Property Assurance and Trust Society*, [1856] 4 W.R. 605.) Next, suppose the master to have discovered the servant in an act of dishonesty,—or in some breach of a duty which is covered by the policy,—but to have made that discovery in time to prevent any consequent loss, must the master acquaint the insurer with what has occurred? Apart altogether from any special condition of the policy, equity requires him to do so (*Phillips v. Foxall*, [1872] L.R. 7 Q.B. 666), the reason being that such a condition of things indicates an added risk. Now assume that the master, in the circumstances above suggested, has duly reported those circumstances to the insurers, may he stop there, or must he dismiss the defaulting servant? The answer to this question depends solely upon the will of the insurers in the matter of continuing to cover the risk. It is obvious that on hearing of conduct on the part of the person whose fidelity they have guaranteed, indicating that such a person is unfaithful to his trust, the insurers may refuse to be responsible any longer save at an enhanced premium. The master must then make up his mind whether he will keep the servant without a guarantee, or keep him at a higher rate of premium in respect of future services, or dismiss him. Suppose, however, an insurer to have guaranteed an establishment or staff under a collective guarantee policy and the dishonesty of one of the staff is disclosed and communicated by the employer. In such a case it is obvious that the insurer may require the defaulter to be dismissed, so as to mitigate the collective risk. It follows that if the employer refuses to co-operate with the insurer in thus limiting the latter's risk, equity will regard the insurer as discharged from any further obligations under the relative policy.

Apart from any special condition in the policy, the insurer cannot avoid his liability where the circumstances surrounding the employment are such that immediate dismissal is not a sanction available, as where a county treasurer was found to have no power to dismiss rate-collectors. This point directly arose in two Irish cases. (*Lawder v. Lawder*, [1873] 7 I.C.L.R. 57, and *Byrne v. Muzio*, [1881] 8 L.R. Ir. 396.)

Does each and every alteration in a servant's duties constitute a circumstance which must be communicated to the insurer? The answer is in the negative. The employer is bound to communicate any change

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<sup>1</sup> Hence the framing of a special condition, often included in modern policies, stipulating that any "reasonable suspicion" is to be communicated. (For an example, see p. 366, *post*.)

in the conditions of a servant's employment which he knows or ought to know must adversely affect the risk. But there the duty of disclosure ends. Thus, where there is a mere increase in the burden of duties which the servant has to perform, while the duties themselves are of the same nature as the parties contemplated when the policy was issued, there is nothing material to disclose. (*Skillett v. Fletcher*, [1867] L.R. 2 C.P. 469.) But where a servant's remuneration was altered from a fixed salary, the extent of which had already been disclosed to the insurer, to payment by commission only, the alteration was held to discharge the surety. (*North Western Railway Co. v. Whinray*, [1854] 10 Exch. 77.) In the same connection it is to be remembered as now well-settled that where new duties increase the risk, an insurer may on that ground avoid the policy, even when the actual loss was not occasioned by reason of those new duties, but was connected with the performance of the original duties. (*Pybus v. Gibb*, [1856] 6 E. & B. 902; *Wembley U.D.C. v. Poor Law, etc., Asscn.*, [1901] 17 T.L.R. 516.)

**Notice of loss.**—Apart altogether from any special stipulations in that regard which the policy may contain, the assured under a fidelity guarantee policy has a general duty to acquaint the insurer with the fact of a loss having occurred, and to do so with all such expedition as the particular circumstances make possible. This duty is an implied term of the contract. The implication is necessary, because the insurer's opportunity himself to take steps towards mitigating the loss depends upon the time when he first hears of it and the extent of the relative information given him. For this reason the assured is under an obligation to acquaint the insurer with every material circumstance which it is in his power to report. In practice it often happens that the assured at the time of the discovery has but a partial knowledge of the material circumstances, and may indeed be only able to make a rough guess at the extent of the loss. This state of things, however, will not exonerate him from the duty of keeping the insurer fully informed of everything he has discovered as and when the material facts come to his knowledge. It is but to implement his duties in the foregoing regard that he must afford to the insurer every reasonable facility towards making an investigation of the circumstances for himself. Practical experience has often demonstrated that strict attention to the foregoing duties on the part of the assured has in cases of dishonesty enabled considerable recoveries of property to be effected. Included in losses occasioned by acts of dishonesty or neglect of duty of the kind contemplated by the type of policy under discussion are claims by third parties. Any such claim, even if made verbally, should be communicated with equal expedition to the insurer.

A notice of the loss, if complying with the foregoing principles, is a good notice, though only given verbally. Ordinary prudence, however, would suggest that where, for expedition's sake, verbal information has been sent the same should be carefully confirmed in writing.

In *Davies v. National Fire & Marine Insurance Co. of New Zealand*, [1891] A.C. 485, 489, the Privy Council decided that a notice is good if given by an agent of the assured; and it was decided in Ireland (*Patton v. Employers' Liability Assurance Corp.*, [1887] 20 L.R. Ir. 93) that a notice is good if delivered by any person purporting to act on behalf of the assured. The foregoing decisions are authorities indicating the circumstances under which a valid notice may be given, so long as the contract does not condescend to deal with the manner in which a notice

of loss is to be rendered. A notice, however, which is in disconformity with such provisions will be invalid.

Nice questions often arise touching the receipt by the insurer of a notice intimating loss. These have usually arisen from the English law of agency, as the same gradually developed and became expressed by a number of decisions of common law judges over the centuries, modified as the effect of these has been by the application of principles of equity. In India the topic of agency is the subject-matter of Chapter X of the Indian Contract Act.<sup>1</sup> So far back as *Gale v. Lewis* ([1846] 9 Q.B. 730) it was decided that where a policy was negotiated through an agent of the insurers, the assured, unless notified to the contrary, would be entitled to assume that the same agent's authority to represent the insurers continued; and thus a notice given to him would bind the insurers. This is so even where the agent has, in fact, ceased to represent the insurers, if the assured be unaware of that fact. (*Marsden v. City & County Assurance Co.*, [1865] L.R. 1 C.P. 232.) The ratio decidendi in the foregoing cases is conformable with the principles recognised by the Indian Contract Act. Naturally, where the terms of the policy contain a stipulation that notices of loss are receivable only at the insurer's head office, an intimation to an agent would be in breach of such a condition, and consequently would not bind the insurers. It is otherwise, however, if the agent shall have taken upon himself to forward the intimation to the head office and such an intimation has arrived there within the prescribed time. (*Shiells v. Scottish Ass. Corp., Ltd.*, [1889] 16 R. (Ct. of Sess.) 1014.)

**Modern fidelity guarantee business.**—In the preceding pages of this section an attempt has been made to give the reader an outline of the legal principles affecting this type of business. The peculiar hazards which past experience has shown as attending it have necessitated a much stricter attention to detail than was formerly the case, and, as already observed, have obliged modern insurers to bestow much time and attention to improving the forms in which their preliminary enquiries are cast and to devise a more comprehensive set of conditions than were considered necessary in earlier days. In the case of questions put to the would-be assured—who must in fidelity guarantee business be regarded as, in some sense, the Proposer—it is customary now-a-days to insist that the answers, together with the words of a suitable declaration to be made by such a proposer, shall form the basis of the contract. The legal effect of such a stipulation is to entitle the insurer to avoid the contract, if it turn out that any of the answers be untrue.

In illustration of what may be considered modern practice in the foregoing regard the following questions have been extracted from a *questionnaire* in use in India today. In these questions the servant whose honesty is to be guaranteed is referred to as the Applicant for the guarantee.<sup>2</sup> The questions themselves are addressed not to him but to the employer who, if the policy issues, will thereby become the assured.

<sup>1</sup> Comprising secs. 182–238 of that statute.

<sup>2</sup> The applicant in such a case is not the Proposer, in that the truth or otherwise of any answers given by him to such questions as the insurers choose to put, does not affect the validity of the policy, unless the assured (who is the *real* proposer) warrants their truth. Nonetheless, if the applicant so deliberately misrepresent facts concerning himself as to amount to the making of fraudulent misstatements, in reliance upon which the Insurer has issued a policy and is eventually obliged to pay on it, the applicant would expose himself to an action for damages, if not to a criminal prosecution.

In the case of an applicant already in the employment of the would-be assured the following pertinent questions are to be answered:—

“(1) *What Security has he hitherto given you? If previously in your employ without Security, why is this Guarantee now required?*

(2) *Has any application for a Guarantee ever been made on Applicant's behalf so far as you know?*

(3) *What character did you receive with him from his last employer? Was he reported as perfectly honest and trustworthy? What post did he fill?*

N.B.—*Any references obtained should be forwarded for perusal.*

(4) *Have you always been satisfied with his honesty and general conduct: have his accounts always been correct and are they at present in proper order?*”

As suitable to the case of any applicant for this class of guarantee, whether he be already employed or be only seeking service with the proposed assured, the following questions may be studied:—

“(1) *What is the amount of Guarantee required? Is it the only Security you hold or will hold? If not, give particulars.*

(2) *In what capacity will the Applicant be engaged, and where?*

(3) *What salary do you give him, and how will it be paid?*

(4) *Will there be any other remuneration to the Applicant, either by commission or otherwise; if so, what?*

(5) *Is his remuneration subject to any deduction, such as liability for bad debts, &c.?*

(6) *Is he at present in your debt in any way?*

(7) *Is the premium on this Guarantee to be paid by him, or you?”*

All questionnaires designed for the purposes above alluded to contain searching enquiries as to the precise duties which will be imposed upon the applicant, the degree of responsibility which will be his, and the extent of supervision over him which will be exercised. The scope of this treatise does not permit us to give more than one example of a set of questions framed for the purposes described. The following nine questions, however, will afford good examples. They have been framed with special reference to one whose duties and responsibilities would involve him in the handling of money and the compilation of proper accounts.

“*With respect to the duties and responsibilities of the Applicant, please state as fully as possible:—*

(1) *What amount of money will be entrusted to him at any one time, and how long will he hold it?*

(2) (i) *How often do you require him to render a statement of cash received and pay the same to you or into the Bank, and how do you verify its correctness?*

(ii) *If he will have a floating balance in hand, how often will he be required to produce it?*

(3) *If he will have the custody of petty cash, please state how often the payments therefrom will be checked against the vouchers independently of Applicant?*

(4) *How often do you send statements of account to all customers direct by post and independently of Applicant?*

(5) *Is he allowed to draw upon the Bank, if so, with what restriction?*

(6) *How often will the Bank Pass Book be examined and checked against the Cash Book independently of Applicant?*

(7) *How often do you balance your books, and is there any professional audit?*

(8) *If he will have a stock under his control, please state extreme value and also how often it will be examined and checked independently of Applicant?*"

The specimen questionnaire from which the above extracts have been taken is followed by a Declaration which the proposed assured (therein called "the Employer") is required to make. It is in the following terms:—

*"The above-named Employer declares that this Statement is true, and is willing that the above replies should be taken as the basis of the Contract between the employer and [the Insurer] and agrees to accept a Policy upon the express condition that the accounts of the said Applicant have up to the date hereof been correctly rendered, and that he is not now, and has not been in any way in default with regard to moneys coming to his hands."*

The legal effect of the foregoing Declaration is to constitute the answers given to the questions touching the duties and responsibilities of the applicant and the employer's check upon him warranties. In consequence, any alteration of the servant's duties or responsibilities, or in the degree of supervision so disclosed, will vitiate the policy and discharge the insurer from any liability.

**Form of policy.**—The student has already been made aware of the fact that modern insurers dealing with this class of insurance business are not only ready to issue policies in respect of individual servants, but offer similar policies covering any number of servants collectively employed by one and the same employer. Since it would be outside the scale of this work to discuss more than one form of such a policy, a specimen instrument in use in British India today designed to afford fidelity guarantee for an entire staff is set out below. It is styled a Fidelity Guarantee Collective Policy. In this particular instrument the master is throughout referred to as the Employer and the person whose fidelity is guaranteed is styled the Employed. The operative words read as follows:—

*"IN CONSIDERATION OF the first premium and subject to the terms and conditions contained herein or endorsed hereon which are to be deemed conditions precedent to any liability on the part of the [Insurer] so far as they relate to anything to be done or complied with by the Employer,*

*THE [Insurer] AGREES to make good and reimburse to the Employer all such direct pecuniary loss, not exceeding the amount of guarantee, as the Employer shall sustain by any act of fraud or dishonesty committed by any of the Employed (a) during the currency of this insurance and (b) during the uninterrupted continuance of employment of such Employed and (c) in connection with his occupation and duties AND DISCOVERED during the currency of this insurance or within six months thereafter or within six months after the determination of such employment whichever event shall first happen."*

There follow some four unnumbered conditions. The first of these distinguishes between the case where the insurer has been asked and has given his consent to a change in the nature of the master's business, or in the duties and conditions under which the servant serves, or to some reduction in the latter's wages, and non-observance of the precautions and checks for securing accuracy of accounts: the intention being, in the

latter case, to avoid the policy altogether. It is thought that the other conditions quoted below need no particular comment.

*"The proposal for this insurance made by or on behalf of the Employer together with any correspondence relative thereto shall be incorporated herein and be the basis of this contract and of every renewal. And the [Insurer] shall not be liable to make any payment hereunder if the nature of the business of the Employer or the duties or conditions of service shall be changed or the remuneration of any of the Employed reduced without the sanction of the [Insurer] or if the precautions and checks for securing accuracy of accounts shall not be duly observed.*

Notice in writing shall be given to the [Insurer] within seven days after any act of fraud or dishonesty on the part of any of the Employed or of reasonable cause of suspicion thereof or of any improper conduct shall have come to the knowledge of the Employer or of any representative of the Employer to whom is entrusted the duty of superintendence over any of the Employed and no amount shall be payable under this policy in respect of that Employed by reason of any act committed after such knowledge shall have come to the Employer or his said representative. Within three months after such notice the Employer shall deliver to the [Insurer] full details of his claim and shall furnish proof of the correctness of such claim. The [Insurer] shall not be liable to pay more than one claim in respect of any one of the Employed. All books of accounts of the Employer or any Accountant's reports thereon shall be open to the inspection of the [Insurer] and the Employer shall give all information and assistance to enable the [Insurer] to sue for and obtain reimbursement by any one of the Employed or by his estate of any moneys which the [Insurer] shall have paid or become liable to pay under this Policy.

Any moneys of any one of the Employed in respect of whom a claim is made in the hands of the Employer and any moneys which but for any act of fraud or dishonesty committed by such one of the Employed would have been due to that Employed from the Employer shall be deducted from the amount otherwise payable under the policy. The Employer and the [Insurer] shall share any other recovery (excluding insurance and reinsurance and any counter security taken by the [Insurer]) made by either on account of any loss in the proportions that the amount of the loss borne by each bears to the total amount of the loss.

If any difference shall arise between the [Insurer] and the Employer such difference shall be referred to a single arbitrator and the costs of the reference and award shall be in the discretion of the arbitrator. The making of an award in such reference shall be a condition precedent to any liability of the [Insurer] or any right of action against the [Insurer] in respect of such difference. If the [Insurer] shall disclaim liability for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provision herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

There follow two schedules. The first provides a convenient form within which the name, address and business of the employer can be stated, the amount of the first premium, and the renewal date. There is also a reference to a second schedule as containing the names of the employed and their relative occupations and duties, etc. The second schedule is in columnar form, wherein, in respect of each person whose fidelity is guaranteed, there appears the date of the risk, the name, the relative occupation and duties, the amount of the guarantee, and the amount of the annual premium.

**An unusual stipulation.**—A stipulation, not as common today as formerly, provided that “the employer shall if, and when, required by the company but at the expense of the company if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty in consequence of which a claim shall have been made under the policy and shall, at the company’s expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or by his estate, of any monies which the company shall have become liable to pay”. In *London Guarantee Company v. Fearnley*, [1880] 5 A.C. 911, the policy declared that the sum guaranteed was “subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy”. The employed person committed an act palpably dishonest, and the insurers called upon the employer to prosecute. This the latter failed and neglected to do. In an action on the policy the breach of the foregoing stipulation, which was construed as a condition precedent, was held a good defence to the action.

**Position of receiver or liquidator.**—It has been held in America that where the affairs of a firm or corporation pass into the hands of a receiver or liquidator, the servants remain the servants of the undertaking; and therefore there is no change of employment or duty within the meaning of an ordinary fidelity guarantee policy. The benefits of the policy, therefore, so long as the undertaking lasts and the life of the policy continues, are available to the receiver or liquidator as the case may be. (*American Surety Company v. Pauly*, [1896] 72 Fed. Rep. 470.)

**Payment under the policy.**—If the employer at the time of discovery of the loss has in his hands any unpaid commission, security deposit, or any other monies which the defaulting servant may have earned but has not received, the amount of such monies must be deducted from the gross figure of loss which the assured has sustained, so as to arrive at the net figure for which the insurer is liable. (*Fifth Liverpool Starr-Bowkett Building Society v. Travellers Accident Insurance Co., Ltd.*, [1893] 9 T.L.R. 221.)

**Subrogation and contribution.**—As in other classes of insurance contracts, those who are bound to provide an indemnity under a fidelity guarantee policy are entitled to the benefit of anything in the hands of the assured or to which the assured himself may be entitled by means of other policies of like nature and intent, or other guarantees in respect of the same servant. Such rights are to be enjoyed by the application of the principles of subrogation and contribution. (*Employers’ Liability Assurance Corporation v. Skipper and East*, [1887] 4 T.L.R. 55; *American Surety Co. of New York v. Wrightson*, [1910] 103 L.T. 663.)

**Other guarantee business.**—The scale of this treatise does not permit a detailed discussion of the numerous forms of guarantee which may be obtained from insurers now-a-days by means of instruments which may properly be styled “policies”. Suffice it to say that though such business is not as yet in a very advanced stage of development in India, it is otherwise in England and the self-governing Dominions, in America and upon the continent of Europe, where policies guaranteeing the due performance of their duties on the part of directors and managers, the integrity of public officials, the solvency of trading concerns or of

individual persons, and the payment of individual debts, are obtainable by means of appropriate contracts and at premium rates which are considered reasonable. The principles of law governing such contracts of guarantee are the same as have been enunciated in respect of that species described as fidelity guarantee business; nor are the rights and liabilities of the parties under such other contracts of guarantee different in any essential feature from those already discussed. But it must be remembered that every contract is primarily governed by its own terms.

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## CHAPTER VII

### LIFE INSURANCE

1. Preliminary. 2. Nature of the contract:—Definitions—Novation—Amalgamation and transfer of business. 3. The doctrines of wager and of insurable interest:—Relatives—Husband and wife—Master and servant—Partners and others commercially connected—Creditor and debtor—Strangers in charge of children—Sureties—Trustee and *cestui que trust*—Declaration of interest or benefit. 4. Agency:—Definitive—Relation of agent to principal—Relation of agent to third parties—Doctrine of imputed knowledge—Agent's representations in general—Foregoing principles illustrated—Canvasser—Doctor—Advertised agent—Agent's fraud on his principal—Misrepresentation to third parties—Third party's reliance on supposed authority—Position of agents under Insurance Act, 1938. 5. Formation of the Contract:—Preliminary—The prospectus—Insurer's sources of information—How requisite information supplied—Persistence of duty to disclose—Rule applies to revived policies—Fraudulent misstatements: (1) By proposer or by the life, (2) By the private referee—Where referee a mere agent—Medical examination and report—Warranties and representations—Copies of proposal and medical report. 6. The policy and its conditions:—Preliminary—Construction—Form—Proof of age—The agreed contingency—Claimant's title—Privileges—Special clauses: Travel, residence, occupation—War—Suicide—Days of grace—Forfeiture—Indisputability—Statutory restraint on disputability—Other such clauses—Waiver. 7. The Premium. 8. The claim:—Preliminary—Nomination—Trusts under Married Women's Property Act—Who can sue to enforce the trust—Trusts under section 5 of the Trusts Act—Claims to inherit—Sale—Transfers and assignments—Application of policy monies.

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#### 1. Preliminary.

By the law of India as of England a man may enter into a contract of insurance (so-called) respecting his own life or, within certain limitations, on that of another. Logically speaking, of course, a man cannot *insure* his own or anyone else's life. What he "insures", or—to speak more correctly—what the other contracting party takes upon himself to "assure",<sup>1</sup> is the payment of a sum of money. In every such agreement the person who contracts with the insurer is by the latter *assured* that the money will be paid to whomsoever by the terms of the contract it is legally due. For these reasons he who contracts with the insurer is styled the "assured"; while the person in respect of whose life the

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<sup>1</sup> Some text-book writers prefer to treat of the subject under the more correct caption "Life Assurance". In the following pages the more popular expression is retained.

contract is made is commonly referred to as the "life". When that person dies the life is sometimes said to have "dropped".<sup>1</sup>

The business of life insurance in India is already extensive and seems destined to increase. Here, as elsewhere, such insurance in at least one of its aspects has rightly come to be regarded as a form of investment. In so saying reference is made not only to what is known as "whole-life" policies, but to contracts which provide annuities, and to those by which the security offered takes the form of an undertaking to pay a lump sum of money at the end of a specified period. A policy of the last-named type is styled an "endowment" policy. It is often combined with a typical "whole-life" insurance contract so as to make the sum secured payable either on a specified date or on the dropping of the life, whichever comes first. Modern commercial enterprise has added other attractions to those provided by the simpler forms of life policy. Such stimuli to investment in some form of life insurance commonly take shape in periodical payments or credits to the assured, each of which is styled a "bonus". These are based on estimated profits actuarially arrived at from time to time in which certain policy-holders are thus permitted to participate. By this means the sum originally claimable on the policy may be substantially increased. There are also schemes whereby a policy-holder may otherwise acquire a share in the profits of the insurer with whom he deals.<sup>2</sup> He may, moreover, by an appropriate contract provide himself with payments by way of compensation for physical disablement; and a sufficient premium may entitle him thus to cover the results of two or three misfortunes leading to disablement. Such compensation is commonly referred to in the profession<sup>3</sup> as a "disability benefit". Many insurers offer a combined life and endowment policy, with or without the provision of disability benefits.

All modern insurers spend a great deal upon publicity; and the agents of all reputable insurance undertakings are provided with copies of their principal's prospectus and often enough with other literature explanatory of particular schemes. The descriptions of the particular schemes thus advertised are naturally intended to, and as naturally do, in fact, operate as inducements to take up one or more of the insurer's policies. How far the descriptive or explanatory matter thus put forward may affect the terms of the bargain ultimately struck between the parties to individual contracts of life insurance, so as to entitle a court of justice to look at the prospectus or other matter as an aid to the interpretation of the contract, is a question of mixed law and fact, depending upon the

<sup>1</sup> The expression is an old one. Some would call it obsolete: "Drop" is good English for "cease". It is useful in the particular connection, since it avoids such a common phrase as "the life dies", which sounds—as in fact it is—an inaccurate expression.

<sup>2</sup> By sec. 49 of the Insurance Act (IV of 1938), which came into force on the 1st of July, 1939, insurers over whom the Government of India can effectively exercise control under the statute are forbidden, in respect of life insurance business, to declare or pay any dividend to shareholders or any bonus to policy-holders except out of a surplus ascertained as the result of an actuarial valuation of the assets and liabilities of the insurer.

The Insurance Act, 1938, is re-printed together with the Statutory Rules thereunder as Appendices I and II respectively to this treatise. A short commentary on the Act will be found in Chapters IX, X and XI, *post*.

<sup>3</sup> In England and America what was formerly spoken of as a "trade" is now-a-days considered, and more often referred to, as a "profession". In London there is now a Chartered Insurance Institute which grants degrees; and the same are said to be recognised throughout the insurance world.

circumstances of each case. The subject thus touched upon will be referred to later in the present Chapter.

In the development of insurance business there had, in some countries, been evolved a vicious principle, which came to be known as the "dividing principle", whereby the benefit purported to be secured by a policy of life insurance depended either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or whereby the premiums payable by a policy-holder depended wholly or partly on the number of policies which became claims within certain time-limits. Upon either plan the security purported to be offered was not in any genuine sense fixed at all.

The above method of doing business upon the dividing principle is forbidden to any insurer who has not adopted such a principle before the 1st of July, 1939, when the Insurance Act (IV of 1938) came into force. Insurers who may in the past have been adopting such a principle are given three years from the last-mentioned date to discontinue the same.<sup>1</sup> The statutory prohibition, however, is not to be deemed as preventing the allocation of bonuses to holders of life insurance policies as a result of the periodical actuarial valuation rendered compulsory under section 49 of the Act, either as reversionary additions to the sums insured, or as immediate cash bonuses, or otherwise. In the case of insurers availing themselves of the permission to carry on business upon the dividing principle, as heretofore, for another three years, the statute compels them to withhold from distribution not less than 40% of the premiums received during each of the years after the commencement of the Act during which such business continues. The sum so withheld from distribution is required so as to insure the requisite investment of monies under section 27 of the Act.

The discussion of the commercial aspects of the foregoing types of insurance is outside the scope of this treatise. So, too, is even an enumeration of the variants which modern commercial ingenuity has evolved. For the purpose of this short introduction to the relative law it must suffice to say of all such contracts that to be binding upon the parties, they must conform to the general law as the same is to be found in the Indian Contract Act (IX of 1872)<sup>2</sup> as well as to such provisions of the Insurance Act, 1938, as in any way affect them. Being contracts in the nature of insurance they will be construed in the light of those principles which the law of India has long recognised and applied in such cases, foremost among which must be mentioned those which have given rise to the doctrine of Insurable Interest and the Rule of Good Faith.<sup>3</sup> It may here be well to note that not all of those notions which underlie other contracts of insurance are applicable to every class of life insurance. For example, while all other forms of insurance are in contemplation of law to be regarded as wholly or partially contracts of indemnity, very few contracts of life insurance can be so classified. It is obvious that where an individual insures his own life by what is called a whole-life policy the sum secured cannot be enjoyed by him either as an indemnity or at all. Logically it is otherwise where the insurance is

<sup>1</sup> By sec. 52. The section is set out at p. xxix, *post*.

<sup>2</sup> *E.g.*, the parties must have the requisite capacity; they must agree to the same thing in the same way; the object to be served must be lawful; and there must be sufficient "consideration". See Chapter II, pp. 26-48, *ante*.

<sup>3</sup> See Chapter III, pp. 66-72 and pp. 89-91 respectively, *ante*.

on the life of another.<sup>1</sup> But when considering what may operate as an inducement to one person to insure another's life the reader must guard himself against confusing a personal motive, which in some instances may be the desire to provide what a layman might think of as an indemnity, with the true intention of the two parties to a contract of life insurance and the form in which that intention is expressed. Unless the insurer agrees to give an indemnity as the law understands it, and the assured agrees to pay for that form of protection, a contract of life insurance, whatever be the assured's private motive in taking it out, will not be so construed. Again, in life insurance business, dictates of expediency have prevented insurers arming themselves against alterations in the risk to the extent achieved in other classes of business. In Chapter V of this treatise examples have been given of stipulations specially designed to protect the insurer in this direction. But, as there pointed out, there must be a limit to the imposition of conditions with that end in view; for if the security is to vary with every change in the risk, the ordinary man may well regard it as no security at all.<sup>2</sup> In the lives of many men it is manifest that the risk of death or disablement alters almost from day to day; in others such risks are suddenly varied by circumstances not envisaged, or at least not foreseen; while in innumerable instances added risks are deliberately courted by the mood of the moment. The practice of life insurance is based on the principle that those who insure men's lives must stick to their bargains; and neither by the general, nor the special law, relating to contracts of life insurance, is there imposed upon the person who has effected such an insurance, or upon him whose life is the subject-matter of the contract, any obligation to acquaint the insurer with an alteration in the risk. There is, of course, nothing to prevent parties from entering into an agreement whereby such obligations are made terms of the contract. But such an agreement would, in general, be far too onerous to be attractive. In consequence of this state of things insurers have to make the best arrangements they can to envisage the nature of future as well as of present risks affecting the life proposed to them. Thus, during the stage of negotiation, it is usual to question the proposer and others concerning the occupation, the habits, and the pastimes of the person whose life is to be covered. In spite, however, of these precautions experience shows the hazards to be so many and various that, prior to accepting a life, far more care on the part of insurers has commonly to be bestowed upon the collection and testing of information than is necessary for corresponding purposes in any other class of insurance business.

Since every rational system of life insurance business must depend upon some accepted theory of probabilities to be deduced from statistical data,<sup>3</sup> it is no satisfactory thing for India that such regulations as exist for the registration of births and deaths in this country are permitted to be largely neglected by the general public.<sup>4</sup> The failure both of the Central and Provincial Governments in India to enforce punctual and correct registration of births and deaths, constitutes not only a standing hindrance to the collection of reliable data—data essential for all-India

<sup>1</sup> But there seems no chance of going back now to the old logical view which prevailed in the days of Lords Mansfield and Ellenborough.

<sup>2</sup> See the discussion at pp. 245, 246, *ante*.

<sup>3</sup> See Chapter I, pp. 3, 4, 6 and 7, *ante*.

<sup>4</sup> In a recent case a Judge of the Calcutta High Court drew special attention to this state of things. See *Umarani Bose v. Modern India Life Ins. Co.*, [1937] 7 Comp. Cas. 199, per Lord Williams, J., at p. 203.

requirements—but creates constant obstacles in the path of those called upon to establish the true age of a given life for the purpose of making good a claim upon a policy of insurance. A further difficulty in the latter respect arises from the fact that Hindus do not customarily give any name to an infant at birth whereby it can subsequently be identified.<sup>1</sup> Until measures of reform have been instituted towards the removal of the foregoing difficulties not only will the development of life insurance enterprise in India be retarded, but its smooth working under existing conditions will continue to be impeded.<sup>2</sup>

It has long been the practice with life insurers the world over to consent to be parties to an agreement whereby, in return for a money payment on their part, the relative instrument is surrendered to them. What an insurer is prepared to pay in any given instance for the surrender of the policy has come to be called the policy's "surrender value". The expression "surrender value" has been judicially interpreted by the Privy Council as meaning "that value or consideration which a company has contracted or is prepared to pay at any particular time during the currency of the contract, in consideration of being relieved as from that time of the liability dependent on the continuance of premiums paid". (*Equitable Life Assurance Soc. of the United States v. Reed*, [1914] A.C. 587.)

Tables are prepared exhibiting the surrender values which the insurer concerned is prepared to offer. Commonly many such tables are published for the information of prospective customers, and form part of the materials with which agents and canvassers are provided for advertisement purposes. In many instances the surrender value as at stated dates is included in a schedule to the policy.

It is a principle of our law that the relation subsisting between an insurer and his assured is at all times governed by the Rule of Good Faith.<sup>3</sup> There are, of course, other situations in which persons may find themselves placed which also attract the rule.<sup>4</sup> Its application to contracts of insurance generally has been explained and discussed in Chapter III.<sup>5</sup>

## 2. Nature of the Contract.

**Definitions.**—By the middle of the 19th century in England the business of life insurance or life assurance—for these expressions were then, as they still are, interchangeable—had become so systematized that the nature of the relative contract could be accurately defined as one under which there is an obligation "to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of his life, and, when fixed, it is constant and invariable". (*Per Parke, B., in Dalby v. India & London Life Assurance Co.*, [1854] 15 C.B. 365, 387.) The student must understand that in the English of Baron Parke's day the word "invariable" had the strict classical meaning of "not to be altered". So, too, by "annuity" was meant that sum which was to be annually paid. Such a payment

<sup>1</sup> Out of this fact arose the difficulties which beset the second Baron Sinha of Rajpur in his first attempt to obtain his present seat in the House of Lords.

<sup>2</sup> See "proof of age" discussed at pp. 414-417, *post*.

<sup>3</sup> Expressed by the two Latin words *uberrimæ fidei* meaning "of the utmost good faith".

<sup>4</sup> See p. 18, *ante*.

<sup>5</sup> See pp. 89-91, *ante*.

had, however, already become known in the trade itself as the "premium". What, commercially speaking, is now-a-days meant by an "annuity" is an annual payment agreed to be provided thenceforward in return for a present lump sum payment.<sup>1</sup> An ordinary policy of life insurance is exactly the reverse. For, under it, one party promises to pay the other an annuity immediately and thenceforward, in return for an enforceable promise to make a lump sum payment thereafter. Modern commercial ingenuity has devised various schemes to serve the purposes of those who desire to secure an annuity. In many instances such schemes have been developed upon the basis of the payment of premiums, as in other classes of insurance policies; others, again, in consideration of a present lump sum payment provide deferred annuities. All such contracts, however, belong to the category of life insurance. For it is to be collected from such cases as *Flood v. Irish Provident Assurance Co.*, [1910] 46 I.L.T. 214, decided by the Court of Appeal in Ireland, and *Joseph v. Law Integrity Insurance Co.*, [1912] 2 Ch. 581, which accepted the foregoing Irish decision as good law, that no matter what be the form of or language used in the document or documents evidencing the contract, wherever the right to payment under it is governed by the happening of a contingency which depends upon the duration of human life, that contract is one of life assurance. This view was accepted in the recent case of *In re All India Home Relief Insurance Co.*, [1938] 8 Comp. Cas. (Pt. I) 17.

Contracts of insurance, as such, are not expressly dealt with by the Indian Contract Act. Indian Courts have construed such contracts as they find them, seeking to interpret them according to the general law of the land: that is to say, they have looked for the meaning which the parties themselves must be held to have intended their contract to bear, and, as an aid, they have had regard to established commercial usage in such matters. Inasmuch as contracts of life insurance in India have long been cast in forms similar to those which have been in constant use in England, Scotland and Ireland, the decisions of the Courts of those countries touching the construction of such contracts and the liabilities created by them have long been relied upon by Indian judges, not—save in exceptional circumstances—as authorities binding upon them, but as guides towards the formation of their own views. The exceptional circumstances so referred to are, of course, those which have brought about a reference to the Judicial Committee of the Privy Council, whose *dicta*, when in point, are authoritative in every Court in British India. *Dalby v. India & London Life Assurance Co.*, *supra*, has frequently been referred to and relied upon by Indian Courts, notably with regard to the doctrine of insurable interest.

**Novation.**—It not infrequently happens that one insurer, as a matter of commercial speculation or for some other business reason, takes over the undertaking of another. Because contracts of insurance are "personal" in their nature, the contract determines where one party thereto ceases to exist or loses his identity; unless there is, what lawyers call, a novation. A novation occurs where the surviving party to a contract agrees to someone "stepping into the shoes" of the other party, with all the legal consequences of so doing.<sup>2</sup> When this happens in the case of a contract

<sup>1</sup> Such a transaction is commonly spoken of as "the purchase" of an annuity.

<sup>2</sup> This is a popular description. The student of law will see in it a tripartite agreement whereby the consent of one original party to absolve the other original party from his promises has for its consideration the provision of another who must himself agree to undertake them.

of insurance, the rules (if any) which govern, or are attracted by, the policy, are the rules of the original insurer; and the company taking over the contract cannot substitute its own rules for those of the former insurer by anything less than an agreement with the policy-holder so to do. This is only to say that a novation to be effective must be complete. (*Adamsbaum v. West of England Friendly Society*, [1926] I.A.C. Rep. 73; and see *Sun Life Assurance Co., Ltd. of Canada v. Nilratan Mookerjee*, [1938] 42 C.W.N. 1197.) In the last-mentioned case the appellant company was resisting a judgment whereby the plaintiff-respondent had obtained a declaration, somewhat curiously worded, designed to place a particular construction upon certain policies originally taken out with an insurer named *The China Mutual Insurance Company*. The plaintiff had taken out one of the policies in 1915. He had been, he said, induced to do so by a passage in the company's prospectus for 1912 relating to paid-up policies. He took out another in August, 1919, being influenced so to do by a similar passage in the company's prospectus for the previous January. He took out yet another in January, 1921, having noticed a similar inducement in the company's prospectus of the year before. In the year 1922 the *China Mutual Life Insurance Company* became (in the language of the judgment) "amalgamated" with the defendant company "which took upon itself the debts, obligations and liabilities of the China Mutual". So far as any individual policy-holder of the latter was concerned, his contract would automatically determine, unless he consented thenceforward to look to the *Sun Life, etc., of Canada* for the fulfilment of the *China Mutual's* obligations to him under the policy, or consented to whatever departure from those obligations might be proposed to him by the last-named company. In either case, for the policy to be thus kept alive with the *Sun Life* in place of the *China Mutual* as a party to it, would involve a "novation". Accordingly, what was agitated before the Subordinate Judge of Dacca and again in the High Court at Calcutta, was the extent, if at all, to which the *China Mutual's* prospectuses were to be read into the policies sued upon or into any of them, and, if to be so read, what were the plaintiff's rights in the matter of an appropriate declaration concerning them. Each of the policies contained what was called a Mutual Agreement. This was endorsed on the back of each policy. In respect of the first policy, the Mutual Agreement contained a clause whereby the company undertook to issue a paid-up policy "for an amount to be determined by the company". In the other policies some two clauses comprised in the relative Mutual Agreements read as follows:—

"5. Loans will be made on this policy after it has been two years in existence, to assist in keeping the policy in force."

"6. After the payment of premiums for three or more full years, provided that there is no debt on the policy under Mutual Agreement 7 hereof or otherwise, the Company on receipt of written application therefor will issue a paid-up policy to the assured or will pay a surrender value."

Now, what the plaintiff relied upon was a passage in the *China Mutual's* prospectuses headed "Paid-up policies". For him the relevant portion read as follows:—

"After the payment of the third year's premium, provided there is no loan from the company secured on the policy, the insured may obtain a non-participating paid-up policy in lieu of his original policy, . . . . . A paid-up policy is one entirely free from payment of any future premium."

*"In the case of an Endowment Assurance or Whole Life Assurance subject to a limited number of premiums, the amount of the paid-up policy will be such proportion of the original sum insured as the number of premiums actually paid bears to the number stipulated to be paid in the original policy . . . . In the case of other forms of policies the paid-up policy granted is usually for the total amount of premiums paid."*

The next section in the prospectus relied upon was headed "surrender values" and read:—

*"If so desired, the company will grant a cash surrender value in lieu of a paid-up policy."*

The plaintiff's object in suing in the manner he did was to have it declared (what the *Sun Life Assurance* had declined to admit) that he was entitled to have issued to him, in respect of each of the policies and in lieu thereof, a paid-up policy for the total amount of the premiums paid. The *Sun Life Assurance* stated that they were prepared to issue him a paid-up policy in respect and in lieu of each of the said policies, not for the total amount of premiums paid, but for some lesser sum to be "*determined by them*". In support of their rights to act in the manner indicated the defendants as much relied on the *China Mutual's* prospectuses as did the policy-holder. The insurers succeeded in obtaining the dismissal of the suit.

**Amalgamation and transfer of business.**—The Insurance Act of 1938 does something to protect the interests of policy-holders in the matter of an amalgamation with, or transfer of business to, some insurer with whom they have not contracted. Naturally, the statute, being of limited scope in the matter of jurisdiction, cannot affect mergers or such like operations between insurers domiciled or incorporated abroad. In the case of British or Colonial companies the law respecting novations to which reference has been made in the previous section of this Chapter applies as it does in India. The protection which the Insurance Act affords, operates before any question of novation can arise. What is aimed at is the prevention of fraudulent or ill-considered amalgamations or transfers and to ensure that policy-holders in the insurance undertakings concerned in the deal shall have some voice in the matter. The jurisdiction conferred by the statute applies only to life insurance business. The relative sections are sections 35 to 37.<sup>1</sup> A brief commentary on these particular provisions will be found later in the present treatise.<sup>2</sup>

### 3. *The doctrines of wager and of insurable interest.*

Readers of Chapter III of this treatise will remember that the notion of "insurable interest" is there described as having come into prominence in England during the latter half of the 18th century, in order to meet the evils attendant upon purely wagering contracts in cases where those were found to have been clothed in the formal attributes of a contract of insurance.<sup>3</sup> At Common Law an action had always lain for the enforcement of a wager where the contract sued upon was of a

<sup>1</sup> See Appendix I, pp. xxii, xxiii, *post*.

<sup>2</sup> See Chapter XI, pp. 558-561, *post*.

<sup>3</sup> See the observations at pp. 66-71, *ante*.

character recognisable as a contract. It should be noted, too, that disregarding for the moment the provisions of section 30 of the Indian Contract Act, a suit based upon a transaction in the nature of a wager would also lie in India where the incidents of it could be shown to be within the conception of a contract upon which the other provisions of the statute proceed. In other words if section 30, which in terms makes contracts "by way of wager" void, were to be excised from the statute, a contract otherwise good but involving a wager would be enforceable by the law of India.<sup>1</sup>

In England, when these evils at last became recognised as acute, the Common Law courts, having in the past frequently given effect to wagerous contracts as also to contracts in the nature of insurance where there was no interest averred in the continued existence of the person or object insured, could not, in spite of an ingenuity which has been described as going to almost ludicrous lengths, suddenly treat such contracts as null and void upon grounds of a public policy only recently discovered. It thus became necessary for Parliament itself to intervene. So in the domain of marine insurance we have the Statute 19 Geo. II, c. 37. By it, wagerous contracts in that field were rendered unenforceable. And in the next reign Parliament proceeded in like manner to remedy the same evils in relation to life insurance: passing, in 1774, a short Life Insurance Act (14 Geo. III, c. 48). The first part of the text of that statute has been reproduced in Chapter III of this treatise.<sup>2</sup> In terms it expressly sets up the doctrine of an "interest" in the life to be insured as a test of the legality of the relative contract. But it also creates, as expressly, an additional test of legality in the case of such a contract, by enacting that no insurance on the life or lives of any person or persons shall be "by way of gaming and wagering". The position in England today is that the terms of the Marine Insurance Act of 1906 achieve the object which had been aimed at by the provisions of the Statute 19 Geo. II, c. 37, alluded to above, and have thus superseded them; while the restrictive provisions of the Statute of 1774 touching contracts of life insurance remain unrepealed.

The position in India has now to be considered. In *Alamia v. Positive Government Security Life Assurance Co.*, [1898] 23 Bom. 191, cited earlier in this treatise,<sup>3</sup> a Judge of the High Court of Bombay had said as follows: "A certain class of agreements such as bets, by common consent, come within the expression 'agreements by way of wager'. Others, such as legitimate forms of life insurance, do not; though, looked at from one point of view, they appear to come within the definition of wagers. The distinction is doubtless rather subtle, and probably lies more in the intention of the parties than in the form of the contract. In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions, and that when a certain class of agreement has indisputably been treated as a wagering agreement in England it ought to receive the same treatment in India." The expression "gaming and wagering" in the Statute 14 Geo. III, c. 48, and the words "by way of wager" in section 30 of the Indian Contract Act were considered and contrasted by the Privy

<sup>1</sup> But so far back as 1848, by Act XXI of that year, the Government of India had introduced a statute of a general nature "for avoiding wagers". It was based on the English Gaming Act of three years earlier. See, also, the discussion of wagering contracts, as such, in Chapter II, pp. 27-29, *ante*.

<sup>2</sup> See p. 67, *ante*.

<sup>3</sup> See pp. 28, 29, *ante*.

Council in *Kong Yee Lone & Co. v. Loujee Nanjee*, [1901] 28 I.A. 239, when it was held that there was no real distinction to be made between them. The decision of Fulton, J., in the Bombay case above alluded to was upheld on appeal,<sup>1</sup> and the view of that learned Judge as expressed in that citation has never been traversed and may, it is thought, be now taken to represent the accepted law of the land upon the topic of wagerous contracts clothed in the form of policies of insurance.

Adverting to the topic of "insurable interest" *per se*, it is to be observed that the Indian Contract Act makes no mention of the matter, and that the Insurance Act of 1938 has but one reference to it. This occurs in section 68, which appears in a part of the statute devoted to the affairs of Provident Societies only.<sup>2</sup> By it any such society is forbidden to accept a premium or any other form of contribution by one party for insuring the payment of money to another, unless that other be the wife, husband, child, grandchild, parent, brother or sister, nephew or niece of the proposer. Although, then, the Insurance Act as also the Contract Act does not purport to lay down any provision of law of general application expressing or even grounded upon the English doctrine of insurable interest as such, the section cited assuredly reveals a recognition on the part of the legislature of the politic principle out of which that doctrine arises. It is submitted as obvious that to have no real and tangible interest in the life of another, creates in one who has entered into a contract under which he is to get money on that other's decease, a direct interest in that person's death. Such an interest provides a palpable inducement to homicide. That consideration in itself, surely, affords a basis on which to found the principle that a contract of life insurance wherein the assured has no interest in the relative life must be void, as being opposed to public policy. That is the principle which it is submitted the Courts in India might well enunciate in plain language. True it is that a train of earlier decisions in England had hampered the Common Law courts in going so far, and had obliged the legislature there to erect the doctrine for itself in terms of the specific enactments of Geo. II and Geo. III to which the reader's attention has been drawn. But it is submitted that no such necessity has arisen in India; for we have here, in section 23 of the Indian Contract Act, provisions which make every agreement the substance of which is opposed to public policy unlawful, and for that reason void.<sup>3</sup> In *Anctil v. Manufacturers' Life Insurance*, [1899] A.C. 604, their Lordships of the Privy Council had to consider a policy which had been held invalid as opposed to public policy on the ground that the assured had no insurable interest. The point, however, had been taken that the bargain between the parties included a condition that the policy was to be "incontestable" after one year, so long as the premiums for that period had been paid.<sup>4</sup> The policy, however, was held unenforceable because void at law under Article 2590 of the Civil Code of Lower Canada inasmuch as the assured had no insurable interest in the life. Lord Watson, delivering the advice of the Board (at p. 609), said "the rule of the Code appears to be one which rests upon general principles of public policy or expediency and which cannot be defeated by the private convention of the parties".

<sup>1</sup> Both courts considered and followed *Dalby's case*, *supra*, as a guide.

<sup>2</sup> Part III. See p. xxv, *post*.

<sup>3</sup> See the terms of the section set out at p. 26, *ante*.

<sup>4</sup> See the discussion of "incontestability" or "indisputability" clauses in life policies at pp. 433-436, *post*.

In *Evanson v. Crooks*, [1911] 108 L.T. 264, which was an action for refund of premiums on the ground that the assured had, subsequent to the issue of the policy, become aware that it was void for want of insurable interest, Hamilton, J., held that in the absence of fraud on the part of the insurer or his agent the premiums could not be recovered back, either as money had and received to the use of the plaintiff, or on the ground that the premiums were paid for a consideration which had wholly failed. Incidentally Hamilton, J., gave it as his opinion that in the absence of fraud a plea of the statute was a complete answer to the claim. So it is submitted a plea of section 23 and/or 30 of the Indian Contract Act would in the absence of fraud be as complete an answer to a similar claim in this country. In the foregoing circumstances it is submitted that the English decisions dealing with the nature and extent of the interest necessary to validate a contract of life insurance may well be followed in India in so far as they can be reconciled with the broad principle of public policy contended for herein. This topic will be reintroduced later in the present Chapter when the subject of the life dropping as a result of suicide arises for discussion.

There are other aspects of the application of the doctrine to life insurance contracts in India that cannot be overlooked even in so short a treatise as the present. At the outset one discerns three principal questions to be answered:—

(a) What is the nature of the interest which is required to validate a contract of life insurance?

(b) Need such interest subsist for the whole period covered by the policy?

(c) Does every policy, commonly recognised as one of life insurance, attract the doctrine to the same extent?

(1) In answer to the first of these questions one may say that where the person who takes out the policy can show that he definitely stands to gain by the continued existence of the life he insures, or, conversely, stands to lose by its extinction, there he will have an interest sufficient to support the contract. Since *Dalby's case* (twice alluded to earlier in this Chapter) it has been regarded as well-settled in England that, except in instances of insurance by one spouse of the life of the other, the interest requisite to support the insurance of another person's life must be capable of expression in terms of money. This is what is meant by a "pecuniary" interest at the time the contract is entered into. The requisite interest must be pecuniary in the sense that money or money's worth is in some way safeguarded by the continuance of the life, and stands to be lost or diminished by its extinction.

**Relatives.**—On the authorities in England no blood relationship or connection by marriage of *itself* creates an insurable interest. (*Halford v. Kymer*, [1830] 10 B. & C. 724; *A. G. v. Murray*, [1903] 2 K.B. 64; *Harse v. Pearl Life, etc.*, [1903] 2 K.B. 92.) It is otherwise in Scotland in the case of father and son; for there the father has an insurable interest in the latter's life. (*English & Scottish Law Life, etc. v. Carmichael*, [1919] S.C. 636.)

It is submitted that in India a Hindu father, at any rate, should be held to have an insurable interest in the life of his son. For not only is there a recognised duty in the son to support the father, but, in the case of a single son, the father looks to him for the performance of religious duties tending to the latter's benefit after death: duties which no more distant relative can so effectively perform. In like manner within the

same community a father, if and when the *Karta* of a joint family, as also any other male member thereof when so positioned, is looked to for direct pecuniary assistance by all other members of the family in social and religious subordination to him. It is submitted, therefore, that in India all members of a joint Hindu family entitled to pecuniary benefit from one who is the family *Karta* should be deemed to have an insurable interest in the latter's life. It is lastly submitted that where in other communities in India, whose personal law is recognised by the Courts, some cognate relationship exists giving rise to similar interests, a similar doctrine should prevail.

It is not without interest to note that the American Courts<sup>1</sup> admit an insurable interest in the life of any relative where, apart from any legal liability in the matter, there is *actual* dependence on that relative. And those Courts also recognise an insurable interest in the life of a stranger to the blood in the case of an adoption by that stranger. In India, wherever the personal law so ordains, an adopted son enjoys filial rights and must assume filial obligations. One so positioned would therefore be within the principle advocated herein as applicable to natural sons lawfully begotten.

Logically enough, the English authorities admit an insurable interest wherever it can be shown that the person who takes out the policy is exposed to the loss of some legal right by the dropping of the life insured or will by that event be subjected to some legal liability. (*Hebdon v. West*, [1863] 3 B. & S. 579; *Tidswell v. Ankerstein*, [1792] Peake 151.) But neither mere optimism in the one case nor pessimism in the other will suffice. Thus a mere *spes successionis* will not entitle an expectant heir to insure the life on which his succession depends, unless he has raised money on that expectancy and has charged his interest, such as it is, in the particular estate (*Halford v. Kymer*, *supra*.) It is otherwise where there is a proprietary interest contingent on another's life. Such an interest is eminently insurable. *Everett v. Desborough*, [1829] 5 Bing. 503; *Sweete v. Fairlie*, [1833] 6 C. & P. 1; *Parson's v. Bignold*, [1843] 13 Sim. 518; *Henson v. Bladsvell*, [1845] 4 Hare 434. Indeed a reversionary interest creates one or more insurable interests according to circumstance. And mere moral obligations consequent upon the life insured dropping as contrasted with legal liabilities resultant therefrom do not create an insurable interest within the meaning of the doctrine in England. (*Hebdon v. West*, *supra*.)

It may be a nice question whether the position be not very different in India, where, in many cases, the social disabilities attendant upon a repudiation of certain classes of moral obligation are capable of expression in terms of money; and whether, upon grounds of the same nature as have been advocated above in reference to other Hindu customs, the courts ought not, in such circumstances, to lean towards admitting an insurable interest sufficient to support a contract of life insurance.

**Husband and wife.**—Since, at any rate, *Griffiths v. Fleming*, [1919] 1 K.B. 805, it has been treated by text-book writers as settled in England and Scotland that each party to a Christian marriage has an insurable interest in the life of the other. It is maintained that the effect of the authorities is to make it possible to say that each spouse is "presumed" to have an insurable interest in the life of the other, and accordingly need not be called upon to establish it. Up to the date of *Griffiths v. Fleming*,

<sup>1</sup> See Macgillivray, *Insurance Law*, 2nd Ed., p. 224, and cases cited.

however, the so-called presumption had only been categorically stated as available to the wife. It depended, of course, upon her right to her husband's support, from which it could be said that she possessed by reason of that right a "pecuniary" interest in her husband's survival. It appeared to have been not so easy to find a pecuniary interest in the survival of the wife. Pickford, J., when disposing of the last-named case, sought to discover it in "domestic services" likely to be lost. But this view was not shared by the judges of the Court of Appeal: it is not easy to see why,—unless they thought they had found something better. For in the law matrimonial of England—much of which has found its way into the Indian Divorce Act (IV of 1869)—loss of *consortium* by reason of the alienation of the wife's affections and the loss of her domestic "services" (in the widest sense of that expression) combine to support an action for damages against a co-respondent.<sup>1</sup> However, what the Court had to deal with in *Griffiths v. Fleming*, *supra*, was the jurisprudential conception of a joint policy by husband and wife on their lives. Was each spouse insuring the life of the other, or was the wife insuring hers and the husband his? Farwell, L.J., thought that the wife might be insuring *her* life and expressing it to be for the benefit of her husband, contingently on his surviving her. This she could do by virtue of section 11 of the Married Women's Property Act, 1882; while the husband was insuring *his* life for her benefit in a corresponding contingency. Vaughan Williams, L.J., thought that as, by virtue of the same statute, a married woman was given the same *status* as her husband in respect of the ownership of property, the husband might in necessitous circumstances reasonably look to his wife for support, and thus might as much be "presumed" to have an interest in his wife's survival as she in his.

The doctrine in India has not, as yet, been tested. It might, it is submitted, be here founded, at any rate in respect of certain communities, upon the loss of *consortium*: in others, perhaps, so far as the husband is concerned, upon the domestic value of the wife; for it cannot be denied that in the personal law of some communities the wifely duties are not far removed from those of a servant, and that over her the husband exercises rights in many respects as considerable as those of a master.

**Master and servant.**—Since the decision in England of *Hebdon v. West*, [1863] 3 B. & S. 579, it has been considered as settled that masters and servants have an insurable interest in each other's lives.

**Partners and others commercially connected.**—In America (*Connecticut Mutual Life Ins. Co. v. Luchs*, [1883] 108 U.S. 498) a partner has been held to have an insurable interest in the life of a co-partner to the extent of the amount of capital which the latter has contracted to bring in. In another American case it was laid down that one partner has no insurable interest in another save where the latter may be indebted to him personally or to the partnership, and to the extent only of such indebtedness. (*Powell v. Dewey*, [1898] 123 N.C. 108.) There would seem no reason either on principle or authority why, in India, one partner should not be held to have an insurable interest in the life of any co-partner who has brought capital, or contracted to

<sup>1</sup> Medieval Christianity, which, through the Canonists, has greatly affected the law of England in every matter concerning marital relations, evolved the doctrine that husband and wife are spiritually "one". May not half of a spiritual entity be presumed to have an interest in the survival of the other half?

bring capital, into the firm. As a matter of fact partnership insurance is becoming common in British India. It has been suggested that a theatrical manager has an insurable interest in the life of an actor whom he has engaged to perform.<sup>1</sup> And there would seem no reason for contending otherwise.

**Creditor and debtor.**—A considerable chain of authority in England supports the proposition that a creditor has always an insurable interest in the life of his debtor; and it is accepted as sound law, both in England and in America, that where there are joint debtors the creditor may insure the life of any one of them for the whole debt. Lastly, there is authority in both those countries for the proposition that statutes,—such as those of limitation—though they may afford a defence in an action to recover a particular debt, do not have the effect of extinguishing an insurable interest in the life of him who owes the money. The American and English Courts differ in their views of the effect upon the doctrine of insurable interest of cases where the debtor has availed himself of the bankruptcy laws and in due course has obtained his discharge. In England the view prevails that discharge, under, at any rate, the Bankruptcy Acts in that country, extinguishes a debt for all purposes if the debt was contracted within the jurisdiction; and that with the disappearance of the debt goes the insurable interest of the creditor. (*Beather v. Webb*, [1876] 2 C.P.D. 1.) In America the insurable interest of the creditor in such circumstances is held to remain. (*Ferguson v. Massachusetts Mutual Life, etc.*, [1884] 32 Hun. 306; *Manhattan Life, etc. v. Hennessy*, [1900] 99 Fed. Rep. 64.) It would appear open to the Courts in India to decide this question upon principle rather than upon any foreign decision.

**Strangers in charge of children.**—In England strangers who for reward are in charge of children are forbidden directly or indirectly to insure or attempt to insure the life of any child in their care. The prohibition is the creature of the Children Act, 1908 (8 Edw. VII, c. 67). There are Children's Acts in three or more provinces in India today; but none of the provincial legislatures have as yet introduced a prohibition similar to that cited from the English statute. It is suggested, however, that the Courts should refuse to enforce any contract of insurance effected on the lives of children so positioned, grounding such refusal upon the doctrine of public policy; in which case all such contracts would be void under section 23 of the Indian Contract Act.

**Sureties.**—It is well-settled in England that a surety has an insurable interest in the life of his co-surety as also in the life of the principal debtor. (*Lindenau v. Desborough*, [1828] 8 B. & C. 586; *Lea v. Hinton*, [1854] 5 De G.M. & G. 823; *Branford v. Saunders*, [1877] 25 W.R. 650.) The same cases are authorities for the proposition that the extent of a surety's interest in the life of his co-surety goes no further than the latter's proportion of the debt guaranteed.

**Trustee and cestui que trust.**—So early as *Tidswell v. Ankerstein*, [1792] Peake 151, it was decided that an executor in trust has a sufficient interest to enable him to take out a policy of insurance in his own name upon the life of one who had granted an annuity to his testator. It is

<sup>1</sup> Porter. *Laws of Insurance*, 8th Ed., p. 47, agreeing with a contributor in the *Law Magazine*, Vol. 22 (N.S.) at p. 347.

conceived that the principle embodied in this decision would commend itself to the Courts in India.

(2) Turning to the second of the three questions on page 379 above, it were perhaps well to remind the reader that contracts of life insurance are in general not to be construed as contracts of indemnity, unless the relative instrument (read if necessary with any other document expressly attracted by its terms) plainly indicates the intention of the parties to enter into such an agreement. For example, in *Branford v. Saunders* (*supra*), the insurers had endeavoured to show that the dropping of the life, though admittedly resulting in a tangible liability for the policy-holder, had brought him certain compensating benefits. It was held, however, on the ground that a policy of life insurance is not ordinarily to be construed as a contract of indemnity, that the insurers could not set off the benefit against the liability, so as to extinguish the insurable interest, and so pay less than the sum figuring in the policy.

It is in these circumstances, and in the principles which lie behind them, that the answer to the question propounded is to be discerned. Were life insurance policies contracts of indemnity, the sum insured would be payable the moment the actual loss had been sustained; and the parties thenceforward would be relieved of all further obligations to one another. Taking an insurance by a creditor on the life of his debtor as an illustration, the moment the debt which created the original insurable interest were discharged or became in law demonstrably unenforceable, the loss for which the indemnity was designed would have occurred, and the sum insured would be payable, irrespective of the fact that the debtor whose life was the subject-matter of the policy was still alive. But such is not the position created by a policy of life insurance. Although the obtaining of something which might be loosely called an indemnity may have been the motive behind the insurance, such is not the bargain between the parties; and the law administered by a court of justice does not substitute an imaginary bargain for that into which the parties have chosen to enter. True it is that in the illustration given above the original insurable interest has gone. But the bargain between the parties contemplates no right to payment of the lump sum till the life itself drops, nor any relief from the liability to pay premium till the same event shall have occurred. To take another example, it is plain enough that the insurable interest which is presumed of one spouse in the life of the other cannot survive the dissolution of the marriage. Yet, here again, the right to the payment of premium subsists till the life insured drops, and the assured must await that event before he can claim on the policy.

It may, however, justly be maintained that the grounds of public policy which, as it is contended, can alone support the doctrine of insurable interest in the life of another under the law of contract in this country, remain when the interest lapses. But if the grounds which prevent the formation of such a contract without interest were to be pushed to their logical result, the Courts would be obliged to hold it as opposed to public policy to keep the contract alive after the interest had gone. To take that line, however, would be to go behind the bargain into which the parties have entered; and, moreover, would be to inflict an undeserved hardship upon the insurer who would thus lose all premiums from the date when the insurable interest ceased to that when the life dropped. Accordingly, the answer to the question propounded is that the Courts in England do not treat contracts of life insurance as unenforceable merely because the insurable interest in the life is no longer

subsisting at the date when the claim is made; and the Courts in India cannot, it is conceived, follow any other path.

(3) The answer to the third of the questions propounded on page 379 above may, it is thought, safely be given in the negative. The only exception, however, would appear to be policies intended to be and recognised as "endowment" policies. The slightly anomalous position created in England by reason of the fact that such policies are, according to all modern authorities, to be classed as policies of life insurance, while the statute 14 Geo. III, c. 48, invalidates all life policies save where an insurable interest can be shown as existing at the date of the contract, does not obtain in India. Under the law of contract here the endowment of another person by means of a policy of insurance, whether that is to be classified as a policy of life insurance or not, cannot be regarded as opposed to public policy or in any other sense as mischievous or obnoxious to the Indian Contract Act. If then the only ground for insisting upon an insurable interest is in India the exigencies of public policy, then it must surely follow that an insurable interest is only a pre-requisite under the law of the land in cases where the absence of such an interest would render the contract in some sense dangerous. It is submitted, therefore, that for one person to take out an endowment policy for the benefit of another is to enter into a contract of life insurance which does not in India attract the doctrine of insurable interest.

**Declaration of interest or benefit.**—The Life Assurance Act of 1774, more than once alluded to above, did not stop short at the provisions which made the existence of an insurable interest in the life a condition precedent to the validity of a policy of insurance *sur autre vie*.<sup>1</sup> For section 2 of the statute imposed an obligation on the parties to such a policy to insert therein the name or names of the person or persons interested in the life, or for whose use, benefit, or on whose account, such policy was made or underwritten. No such duty is imposed by the statute law of India. The Insurance Act of 1938 (in which we might have expected to find some such provision) requires<sup>2</sup> all indigenous insurance concerns and all foreign concerns in respect of their Indian business to maintain a register or record of policies, and another of claims made thereunder; but the entries required by the statute do not include any information touching insurable or beneficial interest.

As a matter of practice insurers doing business in India are accustomed to insert in what is commonly referred to as a "schedule" to the policy the name of the person or persons declared by the assured to be beneficially interested in it, or who are "nominated" to receive the policy money in certain circumstances. But the fact remains that this is done as a matter of business only, and as some protection to the insurer if and when a claim is made upon the policy otherwise than by the assured or his legal representatives.<sup>3</sup>

Certain it is that the provisions of section 2 of the Act of 1774 operate as some check upon those tempted to take out policies in fraud of the other provisions of that statute. In India the imposition of corresponding obligations, and some statutory insistence on a record of declarations purporting to evidence an insurable interest, would make it less easy than now it is to get behind the law as laid down in sections 23 and 30 of the Indian Contract Act.

<sup>1</sup> "On another life": meaning "on the life of another".

<sup>2</sup> By sec. 14, pp. xiv, *post*.

<sup>3</sup> The subject of Nomination is discussed at pp. 439-442, *post*.

#### 4. Agency.

**Definitive.**—In the stage of negotiation, which for all practical purposes must ever precede the formation of a contract of life insurance, agents play no inconspicuous a part. By the word agent, used in this connection, is meant not only him who so styles himself in respect of the particular business, but everyone who by his relationship to the insurer is in some sense acting on the latter's behalf. Thus the canvasser who calls, the person who follows up a likely introduction which the canvasser has procured, the medical practitioner who makes a professional examination of the candidate on the insurer's behalf, and the head of a branch office who, besides passing all relative information to the head office, may very likely interview the proposer or correspond with him, may all of them be classified as in contemplation of law the insurer's agents.<sup>1</sup>

The extent to which their several actions bind their common principal is a matter of mixed law and fact, depending upon the extent of the particular authority with which each of them has been clothed. What, in each instance, that authority amounts to must always be a question of fact.

**Relation of agent to principal.**—In general the relations to his principal of an agent for reward, whether the reward be in the form of salary and commission or a commission only, is largely governed by the law of Master and Servant. For the rest, their relations are governed by that branch of the law of Agency which deals with problems directly arising from the legal concept of authority. The one subject impinges not a little upon the other, since the employer will have a right to determine the contract of agency if his interests have been imperilled by the agent wilfully or negligently acting outside the limits of the authority conveyed to him.<sup>2</sup>

If the relationship between the two were governed wholly by the relation of master and servant, a wrongful determination of the contract of service by the master would entitle the agent to no more than the salary he would have earned had he served out his time and been discharged with the agreed notice, or, in the absence of any agreement as to notice, with a reasonable notice. An agent, however, may or may not draw a salary, but in the case of an insurance agent will certainly draw commission. The Indian Contract Act recognises in the relationship of principal to agent and agent to principal something more than that of master and servant. For by section 205 it is provided that where the

<sup>1</sup> The general law of Agency in India is largely codified in Chapter X of the Indian Contract Act (Secs. 182-238). The Insurance Act (IV of 1938) contains in sec. 2, sub-secs. (10) and (13) respectively, definitions of "insurance agent" and "managing agent". These definitions are to be read as indicating what is meant by those expressions for the purposes of that particular statute, which in respect of insurance agents and managing agents as defined therein is purely administrative. Such definitions do not purport to alter the general law of agency as briefly set forth in the present chapter.

The definitions in the Insurance Act alluded to above will be found in Appendix I, p. vi. *post*. The nature and extent of the statutory control over insurance agents which the Act creates is the subject of commentary in Chapter IX, pp. 511-513, *post*.

<sup>2</sup> For an example see *Jupiter General Assurance, etc. v. Ardeshir Bomanji Shroff*, [1937] 7 Comp. Cas. 286, where the Judicial Committee allowed an appeal from the High Court of Bombay. The suit was for damages in respect of an alleged wrongful dismissal.

contract between them is either expressly or by implication to be continued for any specific period of time, the principal must make compensation to the agent or the agent to the principal, as the case may be, for any previous revocation or denunciation of the agency without sufficient cause.

But except where the circumstances are alleged to involve fraudulent collusion between the agent and someone with whom the latter purports to be negotiating on behalf of his principal, third parties are not interested in the rights or wrongs of a controversy between the principal and his agent upon the subject of the contract between them. There are, however, in addition to circumstances already discussed earlier in this Chapter, others wherein the subject-matter of controversy between the agent and the principal may indirectly affect the interest of third parties. A single instance must suffice.

Towards the prevention of a fraud upon third parties most insurers give their assured express notice that no receipts will be accepted as valid which are not upon prescribed forms, or which do not emanate from the head office, or otherwise fulfil conditions mentioned in the notice. Sometimes such a notice is, in fact, incorporated as one of the conditions appearing on the face of the policy itself. Where the insurer thus insists upon a particular form of receipt, the effect is that whatever document a local agent for collection may give by way of acknowledgment of money handed to him, that document will amount in law to no more than evidence that such or such a sum has been paid over to the person signing the receipt and that such a person must have so received it for the use of the insurer. But it will not of itself or for that reason bind the insurer. It follows that the assured will not be protected against the insurer unless and until he shall have received another receipt for the identical sum emanating from the authority mentioned in the notice.

In a recent Indian case a private controversy had arisen between an agent and his principal touching the conduct of the latter's business, and each side considered it had rights against the other which were being disregarded. Amongst other things, the agent considered that there were outstanding dues to him which were not being settled with sufficient promptitude. He conceived himself entitled, under the terms of the agreement between them, to retain certain sums collected by him as premiums, and, having duly accounted to his principal for their receipt, to set them off against his claim for outstanding commission alleged as earned but not paid. The principals considered this both high-handed and dangerous; and they conceived themselves as fully entitled to take such methods of protection as they deemed reasonable. As it happened they had no wish to dispense with the agent's services, but desired only to discipline him to adhere strictly to their reading of the contract between them. Accordingly, when next issuing what they styled "lapsed notices" to such of their policy-holders as had failed to pay their premiums by the due date, they included in the persons so addressed a number of policy-holders in the said agent's district who in fact had paid their premiums by the due date, but had paid them to the agent who, for the reasons already indicated, had not chosen to remit them to the head office. The material portion of these notices read as follows:—

"Dear Sir,

Some circumstances over which you had no control doubtless forced you to permit your policy . . . . . to lapse for non-payment of the premium."

In a suit framed partly for compensation as for a libel, based on the terms of the foregoing notices, the Court held as a matter of law that they constituted no libel.

"It would" said the learned Judge (Panckridge, J.), "take very little to convince me that a policy-holder who had paid his premium would, on receipt of such a letter, consider it as quite probable that the agent had either embezzled the premium or negligently omitted to notify its receipt. Such an inference, however, does not make the letter libellous. To my mind the plaintiff's case as regards libel is based on a confusion of thought. He confuses an inference drawn from the fact of the writing of the letter with the meaning of the language used . . . . By no possibility can the statement that a policy-holder has *not* paid his premium mean that he *has* paid it and that the agent has misappropriated it." (*Sisir Kumar Kerr v. Northern India Insurance Co., Ltd.*, [1937] O.S. No. 267 of 1934. Judgment dated 8th of January, 1937 (unreported).)

The relation between an insurer and an agent empowered to collect premiums naturally involves a right in the former to have an account from the latter. But it does not necessarily follow that there is a corresponding right in the agent for an account from his principal in these circumstances. In general, where the agent collects the premiums and sends them to his principal and from the latter receives his commission, he will ordinarily be taken to know what he has collected and to what commission he is entitled thereon. The rest is mere arithmetic. In this simple state of facts there would be no room for a suit for accounts. (*Gulabrai Dayaram v. India Equitable Insurance Co.*, [1937] 7 Comp. Cas. 136.) In the latter case the foregoing view of the respective rights to accounts was stated; but it was also held that in a suit by an insurance agent against his principal for an account, if the former could satisfy the Court that all the accounts were in possession of the latter, and that he (the agent) was not in possession of any accounts and in the ordinary way of business between him and his principal would not have accounts which would enable him to determine his claim for commission, he would be entitled to sue. But such a remedy by suit is an equitable one; and if the Court considers that he has no accounts only because he was too careless to keep any, or that he has, in fact, accounts in his own possession which he is withholding, the Court would not grant him the relief asked for. The conduct of an agent in setting up false and exaggerated claims would also disentitle him to this equitable relief.

**Relation of agent to third parties.**—The broad legal effect of employing someone else to act for one in the transaction of worldly affairs has long been tersely expressed in the maxim *qui facit per alium facit per se*.<sup>1</sup> It follows that he who deals with a properly authorised agent is in contemplation of law positioned as if he were dealing with that agent's principal. Accordingly everything which the agent says or does in the name of his principal, and which is within the authority committed to him, is binding upon the principal. It is otherwise if what he says or does is outside the scope of his authority; unless—and the doctrine is of the highest importance—the principal has permitted a situation to develop from which what is said or done by the agent might reasonably be supposed by the person dealing with him to be within it. When a principal has thus either created such a condition of things, or permitted it to arise, he is said to have "held out" the agent, or to have "permitted

<sup>1</sup> "He who does aught by the hand of another nonetheless does it himself."

the agent to hold himself out" as having<sup>\*</sup> the authority which the other party supposes him to have. As between the principal and the agent the position described above may be thus summarized. The principal is bound by the acts of his agent whenever those acts are really or ostensibly within the scope of the latter's authority.<sup>1</sup>

**Doctrine of imputed knowledge.**—One of the practical effects of the foregoing notions is that when one party is negotiating with another through that other's agent, any material information which he imparts to the agent in response to the latter's questions may justly be treated as information given to the principal himself. In the language of lawyers, the knowledge thus gained by the agent is to be "imputed" to the principal.<sup>2</sup>

**Agent's representations in general.**—When a duly authorised agent represents to the other negotiator that the legal effect of the contract offered to him will be this or that, such a representation is deemed to be made by the principal, who cannot, therefore, be heard to say later on that there were no such representations from his side upon which the other party could reasonably have relied. If and when such a position be reached lawyers say that the principal is "estopped" from setting up any case at variance with that which his agent has created. The student, however, must be guarded against supposing that a properly authorised agent has but to make a material misrepresentation for the principal to be debarred from correcting it. Every error, including every misrepresentation which an agent of his may have fallen into or have been led to make, as the case may be, may assuredly be corrected by the principal or by the agent himself so long as he can, in fact, put the matter right before any final agreement shall have been concluded. The doctrine of estoppel is only available when, on contest as to the true nature of, or the liabilities imposed by, the relative contract, the party who has employed an agent to bring the other party into agreement seeks to set up a state of facts inconsistent with what his agent has represented. What that agent represented is, of course, only material where the statements made were relied upon by the other party and are shown to have operated as inducements to him to give his adherence to the terms proposed.

**Foregoing principles illustrated.**—The foregoing principles may now be briefly illustrated by reference to decided cases.

**Canvasser.**—In *Pravat Kamal Basu v. Phoenix Assurance Co.*, [1936] 40 C.W.N. 694, the plaintiff described himself as an agent who had been employed by the company to canvass for business. His services had been subsequently dispensed with on notice. He claimed against the company certain sums as due by way of commission on renewals of policies on the part of clients whom he had introduced. The defendants contended that he was not entitled to renewal commission once his contract of agency had been terminated. Two main questions arose. Was such a

<sup>1</sup> Thus the Indian Contract Act, sec. 186: "The authority of an agent may be expressed or implied". So as between the principal and the agent, the substance of most authorities, as "expressed", necessarily "implies" other powers without which the primary duty could not be adequately performed. See, also, sec. 188 of the same statute.

<sup>2</sup> See, in this connection, the pregnant language of Lord Halsbury in *Blackburn Low & Co. v. Vigors*, [1887] 12 A.C. 531, 537, set out in Chapter III on p. 90, *ante*, wherein he points out the limits within which the doctrine of "imputed knowledge" can be properly applied. And for an example see p. 390, *post*.

"canvasser" an "agent"? And, if so, did he continue to be entitled to commission after he had left the insurer's service? The Court accepted the view of Lord Cairns in *Albert Life Assurance Co. v. Lewin's case*, [1871] 15 S.J. 828, that the position of a canvasser is that of an agent who, so long as he is acting for his employers, is daily or weekly soliciting advertisements or renewals; and referred to the opinion of the Madras High Court as expressed in *Empire of India Life Assurance Co. v. S. N. Ayyar*, [1921] 44 Mad. 170, that one important duty of the agent would always be to impress on policy-holders the value of keeping up their premiums.<sup>1</sup> The Court therefore decided that a canvasser so employed was an agent of the insurer. It, however, upheld the concurrent judgments of the Courts below that commission on renewals could only be earned by a canvasser who by his personal efforts had obtained them in the course of his employment, and that no further claims on that head were sustainable once the contract between the principal and the agent had come to an end.

*Doctor.*—The case of *Joel v. Law Union & Crown, etc.*, [1908] 2 K.B. 863—to which a more extended reference will be made hereafter—is a good example of the way in which a medical practitioner is, in modern insurance business, made the insurer's agent for an important though limited purpose. The insurers sent to a doctor of their own choice a printed form with instructions to examine the applicant on their behalf. The form was headed "Questions to be put to the applicant (with any necessary explanation) by the Medical Officer, who will fill in the applicant's answers". In the result a good deal turned upon whether there had been any and, if so, a sufficient explanation of certain questions which the medical man thus engaged was not only authorised but definitely instructed to give.

*Advertised agent.*—The extent to which a company must be held bound by the acts of its ordinary advertised agents is well exemplified in the following cases. So early as 1859 in *Rossiter v. Trafalgar Life Assurance, etc.*, [1859] 27 Beav. 377, insurers were held bound by their agent's acts under the following circumstances. A proposal for a life policy had been accepted on behalf of the British Insurers by their recognised agent in Australia. The transaction had been negotiated by a sub-agent and the premium had been paid. On an attempt to avoid the policy on the ground that the agent had no authority to appoint a sub-agent and that there were some other informalities, the Court enforced the policy, and, in so doing, pointed out that though an agent cannot ordinarily delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons and which are valid when so done.<sup>2</sup>

In 1869 a man entered into a contract with the agent of one insurance company under the impression that he was dealing with that of another company. It was held, on the facts, that there was a concluded contract, and that the company whose agent he dealt with was liable.<sup>3</sup> (*Mackie v. European Assurance, etc.*, [1869] 21 L.T. 102.)

<sup>1</sup> In the course of their judgment the High Court of Madras dissented from the unreported case of *Adinarayan Rao v. Empire of India Life Ass. Co.* (Madras) which had been cited to them.

<sup>2</sup> Sec. 190 of the Indian Contract Act reads: "An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed."

<sup>3</sup> Here there was a "unilateral", not a "common" mistake of fact. See under "Mistake" the discussion at pp. 33-35, *ante*.

In *Ayrey v. British Legal & United Provident Ass. Co.*, [1918] 1 K.B. 136, the facts were that a fisherman had taken out a policy of life insurance which contained a clause providing that if any material information were withheld the policy would be void. In the proposal form the plaintiff had been accurately described as a fisherman. But he was also a member of the Royal Naval Reserve, and was therefore exposed to additional risk. There was no mention in the proposal form of his being a naval reservist. That circumstance, however, was established as having been verbally communicated by the plaintiff to the insurer's district manager. The premiums as they fell due were subsequently paid to and accepted by the district manager. The Court held the latter's knowledge of the true facts to be knowledge which must be imputed to the insurers and (applying still further the doctrine of agency) that the acceptance of the premiums by the district manager amounted to a waiver by the insurers of the breach of the clause in the proposal form which was relied upon. The policy was, therefore, enforced.

**Agent's fraud on his principal.**—In the above connection it may be noted that where the agent, when filling up an application for insurance of certain premises had been informed by the proposer of a mortgage on them, but yet had answered the relative question appearing in the form as to encumbrances in the negative, a Canadian Court in 1878 held that the insurer could not set up the misrepresentation as a defence. (*Naughton v. Ottawa Agricultural Insurance Co.*, [1878] 43 U.C.R. 121.) And in 1893 an Australian Court, in *Gallagher v. United Insurance, etc.* 19 V.L.R. 228, where the agent of the insurer had filled up a proposal form and concealed a material fact within the agent's knowledge, decided against the insurer upon like principles. Just one year before the latter decision the Court of Appeal in England had decided the case of *Bawden v. London, Edinburgh & Glasgow Assurance Co.*, [1892] 2 Q.B. 534, whereby the insurers were made liable for £500 on an accident policy in the following circumstances. The policy entitled the assured to the last-named sum on "permanent total disablement" which, by its terms, included "the complete and irrecoverable loss of sight of both eyes". The proposal contained a statement by the assured that he had no physical infirmity; and it was agreed between the parties that the proposal should form the basis of the contract. In fact, when he signed the proposal, the assured had already lost the sight of one eye. This circumstance was proved at the trial of the action to have been known to the insurer's agent, and it was also established that the latter had not communicated the proposer's condition in this respect to his principals. Later on, the assured met with an accident which lost him the sight of the other eye; and he accordingly claimed on the basis of permanent total disablement. The Court held that the knowledge of the defendants' agent was under the circumstances the knowledge of the defendants themselves, and allowed the assured to recover the policy money.

The trend of these cases, culminating in the foregoing decision of the Court of Appeal in England, caused no inconsiderable stir in insurance circles on both sides of the Atlantic. For a long time past the superior Courts both of England and of the United States had not only showed great respect for each other's judgments in the domain of Contract, but had more than once voiced the view that in the law relating to commercial dealings generally, and with reference to insurance law in particular, the Courts of the two countries should endeavour to achieve

as great a degree of uniformity in the acceptance of governing principles as their respective statute law permitted.<sup>1</sup> Although, as has been indicated above, a Canadian Court had been found to adopt a similar line of reasoning and an Australian Court had followed suit, the Supreme Court of the United States so far back as 1885 had decided the legal effect of cognate circumstances upon quite a different principle. There it had been held that if an agent in fraud of his principal and for the purpose of obtaining his commission, wilfully inserts an erroneous answer in a form he has filled up for the assured, there is created a misrepresentation to the insurer for which the assured himself must be deemed responsible, if he has signed the proposal or otherwise warranted the truth of the statement. (*New York Life v. Fletcher*, [1885] 117 U.S. 519; followed in *U.S. Life v. Smith*, [1899] 92 Fed. Rep. 503; *Mair v. Fidelity Mutual*, [1897] 78 Fed. Rep. 566; *Reid & Co. v. Employers Accident*, [1899] 1 F. 1031.) The same view of this sort of conduct on the part of an agent commended itself both to the Scottish and to the Irish Courts.

Cases continued to occur in England and elsewhere in which it was difficult to resist the view that material misstatements or material omissions were the result of collusion between applicants for insurance policies and the local agents through whom the negotiations had been carried on, and who, in many cases, had filled up or assisted the assured to fill up, the relative proposal forms. The numerous ways in which frauds on insurers were achieving something akin to protection by what many lawyers believed to be a misapplication of the doctrine of estoppel or of imputed knowledge, became increasingly canvassed in England and the Dominions. At last the tide of judicial opinion on the point turned. Its turn in the other direction began with the judgment in *Newsholme Bros. v. Road Transport & General Insurance Co.*, [1929] 2 K.B. 356, which was an action to enforce payment upon a policy of insurance on a motor-omnibus. The agent of the insurers had filled up the form of proposal which the applicant (who in due course became the assured) thereafter signed. The answers thus given contained a number of untrue statements. The Court declined to enforce the policy, and held that the agent who, according to the evidence, was not authorised in fact to fill up proposal forms, but only to see as far as he could that they were correctly filled up, had acted as the mere amanuensis of the proposer, and that the knowledge of the true facts by the agent could not be imputed to his principals. Finally in *Dunn v. Ocean Accident & Guarantee Corp.*, [1933] 50 T.L.R. 32, the Court of Appeal in England, where the material circumstance was that the form, which in this instance had been filled up by the assured, had been accepted by the agent who well knew that there were serious non-disclosures, held that such conduct on the part of the agent did not bind the principal as affecting the latter with knowledge of the true facts.<sup>2</sup> In the two last-mentioned cases, *Bauden's* case, *supra*, was relied upon by the parties seeking to enforce the relative

<sup>1</sup> See the reiteration of this view *per* Lord Wright, M.R., when delivering the judgment of the Court of Appeal in the recent case of *Beresford v. Royal Insurance Co.*, [1937] 8 Comp. Cas., Pt. II, 64, 74. In the same cause, when it was before the House of Lords in 1939 (9 Comp. Cas., Pt. III, p. 1), Lord Atkin said "I attach much importance to uniformity of result in the Courts of the two countries in matters of such strong mutual interest as the law of insurance".

<sup>2</sup> The reader will find a brief summary of the facts in the two last-named cases as also references to certain material portions of the relative judgments discussed in Chapter V of this treatise. See pp. 239-240, *ante*.

instruments, but without effect. That decision can, therefore, be considered as no longer good law in England.

It is submitted that the Courts in India would follow the principle which would seem to underlie the judgments in the *Newsholme Bros.*' case and in *Dunn's* case, one which has, moreover, commended itself to the superior Courts of the United States for the last half-century as applicable to such circumstances. That principle may be stated to be that, where an agent by deliberate neglect of duty to his principal or by some other conduct in fraud of the principal, and for his own purposes, plays into the hands of the other party to a contract which he is instructed to conclude on his principal's behalf, he is, *ex hypothesi*, acting wholly outside the scope of his authority: and no one dealing with him on that footing can be heard to pretend otherwise. For a man does not employ another to defraud him or to defeat his interests by concluding a collusive contract with a third party.<sup>1</sup> It follows that when A's agent to negotiate with B fraudulently lends himself to the interests of B rather than to those of his principal, law as well as equity will regard him, in the particular transaction, as the agent of B and not that of A.

**Misrepresentation to third parties.**—The cases just alluded to illustrate the effect of misrepresentations made by the agent to his principal and in fraud of the latter. Misrepresentations made by the agent on behalf of his principal to a third party with whom he is negotiating have now to be considered. They fall obviously into two categories: those which are made innocently, and those which are intended to deceive and succeed in deceiving the third party. Such misrepresentations are of course within the general rule stated above, namely, that acts done and things said by an agent properly authorised or apparently authorised bind the principal. The legal effect upon the respective liabilities of the parties needs, however, to be stated. There are numerous instances in the books where the assured, having discovered the error into which he has been led, seeks to have the contract rescinded and to get back the money which he has paid by way of premium. In many of such instances although fraud has been alleged it has not been proved. In others it has been common case that the misrepresentation was innocent. It is elementary that where the contract is not vitiated by an illegal object, if the misrepresentation be such that the consideration wholly fails, the assured, like any other contracting party so materially misled, will be entitled to relief, which in a contract of insurance means the return of the premiums.<sup>2</sup> It is otherwise if the contract be void at law, and the assured has entered into it upon a representation, in good faith made by the insurer's agent, that the contract was valid; for in that case both parties would be in the wrong, when the maxim *in pari delicto potior est conditio defendentis*<sup>3</sup> applies. That was the position in *Harse v. Pearl Life Assurance Co.*, [1903] 2 K.B. 92; [1904] 1 K.B.

<sup>1</sup> See, also, sec. 238 of the Indian Contract Act. In *Ruben v. Great Fingall Consolidated, etc.*, [1906] A.C. 439, the House of Lords held that a company's secretary who issued a false share certificate for his own purposes does not bind the company either by reason of a general authority or by the principle of estoppel or "holding out".

<sup>2</sup> See Chapter II and sections dealing with the *Consensus ad idem*, Mistake and Misrepresentation, pp. 29, 33, 36 respectively, *ante*; and see, also, the sections dealing with Return of Premium, at pp. 81, 82, *ante*.

<sup>3</sup> "When equally at fault, the position of the defendant is the stronger." In such a case the Court must lean one way or the other. It leans towards the defendant.

558, C.A. When the last-named case was in the Court of Appeal, Collins, M.R. (at p. 563) said "Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff, so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss". The same principle was applied in *British Workman's and General Assurance Co. v. Cunliffe*, [1902] 18 T.L.R. 502, C.A., and in *Evanson v. Crooks*, [1911] 106 L.T. 264.

From the passage just cited from the judgment of Collins, M.R., the student will be prepared for the information that a fraudulent misrepresentation on the part of the insurer's agent will lead to a very different result. There the insurer is not himself subjected to fraud which on the contrary is being practised in his name on a third party; and as whatever the agent was doing was manifestly within the ostensible scope of his authority, the assured is entitled to rely upon the representations made and to relief against the liabilities which he incurs under a policy so obtained. This position is well illustrated in *Tofts v. Pearl Life*, etc., [1915] 1 K.B. 189, where the assured was declared entitled to rescind a policy and to a repayment of the premiums. Upon a similar view of the matter was decided the case of *Hughes v. Liverpool Victoria Legal Friendly Society*, [1916] 2 K.B. 482, where Banks, L.J., at page 495 thus stated the principle to be applied: "In a case where fraud is proved the authorities are clear that the case cannot be considered as one of *par delictum* and that an innocent plaintiff is entitled to recover."

It was sought in the last-mentioned case to contend that the acts of the two agents concerned in the fraud were beyond the scope of their authority and thus not binding on the insurer. Nonetheless the latter claimed a right to retain the premiums. Philimore, L.J., disposed of this contention by pointing out that in taking such a line the defendants would be as clearly repudiating the bargain as was the plaintiff, in which case the defendants could not, on their own showing, keep the premiums. As a matter of fact the point had been settled against a similar contention of another insurance company by the House of Lords in *Refuge Assurance Co. v. Kettlewell*, [1909] A.C. 243.

**Third party's reliance on supposed authority.**—Persons who deal with agents of insurance companies cannot be heard to say that they "supposed" an agent to have a general authority to do everything which the company itself might do. An agent who merely assists in negotiations or in necessary preliminaries which culminate in a policy is not to be presumed to have authority in every other matter connected with the contract, or to possess powers to decide questions which a very little thought would convince any reasonable man must be for the insurance company itself to decide. Thus, should a person choose to guess that because some local agent acts as the channel through which the assured has sent in his original proposal form, the same agent must necessarily have power to vary the agreed date for payment of premium, or to waive on behalf of the insurers any other stipulation contained in the policy, he must take the consequences if it turn out that the agent had no such authority. In like manner if he chooses to pay over premium to a mere canvasser, for no better reason than that he supposes payment to anyone in the service of the insurer to be payment to the insurer

himself, and the event reveals that the person to whom he had thus paid money has never forwarded it to those to whom the assured owes it, he may well find the insurers able to deny payment; and, moreover, that in consequence of this state of things, he is, after all, uninsured.

Various illustrations have been given earlier in this treatise of the situations depicted above, where the assured has not troubled to enquire as to an agent's authority either from the agent himself or from the agent's principals, but has recklessly acted upon his own assumption. The examples alluded to are *Universal Fire & General Insurance, etc. v. Shup Sin Htai*, [1934] 4 Comp. Cas. 428 (no authority to accept proposals or renew policies; payment had been made to a mere canvasser for business); *U San Dun v. New Zealand Ins. Co.*, [1934] 5 Comp. Cas. 55 (payment said to have been made to representatives of insurers, but established that there was no authority to collect premiums and money not transmitted to defendants). In the last-named case the policy itself recited the payment of premium. But it was held that defendants were not estopped from proving the real facts. In so holding the Court relied upon the judgment of the Privy Council in *Equitable Fire & Accident, etc. v. Ching Wo Hong*, [1907] A.C. 96, 100. Again, *Qua Hai v. Northern Assurance Co.*, [1924] 2 Rang. 158, is another example of money paid to an insurer's representative who was employed only to introduce business. In it plaintiff was held disentitled to recover.

## 5. Formation of the Contract.

**Preliminary.**—In theory, as readers of the second Chapter of this treatise will have noted, contracts are formed by an exchange between the parties of a proposal and its acceptance; and when two parties have agreed about the same thing in the same sense they have attained to what lawyers call a *consensus ad idem*.<sup>1</sup>

In the formation of a contract of life insurance the stage of negotiation is all-important, because the insurer is not in a position to appreciate with anything like sufficient exactitude the risks he is running in accepting any particular applicant's life as insurable till he shall have acquired as much of the relevant *data* as, by the means at his disposal, he is able to obtain.

Two questions at once present themselves to the mind. What is it that a life insurer needs to know? And what have been the methods evolved for obtaining the requisite information?

Obviously, in order to estimate what insurers call the "expectation of life" in any one case, the insurer must have accurate information as to the age which the applicant has already attained by the date of his proposal. The condition of the applicant's health at that time must also be ascertained with such accuracy as an honest and thorough medical examination should reveal. But it is well established that even where a patient is manifestly in an unhealthy condition, a *prognosis* or *diagnosis* based upon no more than a sensory examination may in many cases need considerable modification on learning the full details of the patient's previous medical history. In many instances, moreover, the medical history of the immediate progenitors or even of collateral relations may be such as to put the trained mind upon an altogether different line of investigation.

<sup>1</sup> See pp. 29-31, *ante*.

Accumulated experience, therefore, has led every modern insurer engaged in life assurance business to depend for the most part upon the answers to carefully-prepared interrogatories, addressed in part to the proposer himself (or at any rate to the "life" to be insured) and in part to the insurer's own medical examiner. These questions are, in modern practice, consolidated into the form of one or more *questionnaires*. Experience has naturally led to a large measure of uniformity in the questions now commonly put. But that there is still room for improvement in the direction of careful and clear instructions as to how the questions put are to be understood, and the degree of accuracy to which the answers are expected to attain, a study of the more recent case-law touching the subject of disclosure most strongly suggests. To this aspect of the matter we shall return again.

A factor of great significance in estimating the risk is the vocational factor. In so saying reference is made to the applicant's normal occupation. Nor, as already pointed out earlier in this Chapter, can the applicant's habits and pastimes be left out of account. But it is easy to see that if the questions put, or the explanatory instructions sent with them, be in any way deficient, the information conveyed by an answer may well be lacking in some material particular, merely because the answerer failed to appreciate its significance and consequent relevance. Suppose, for example, a man correctly to describe his profession and occupation as that of a "photographer" and with equal correctness to describe his pastimes as "tennis and swimming", but to make no mention of the fact that he has been enrolled in the Indian Army Reserve of Officers. One so positioned may well consider himself not an Army Reservist in the colloquial sense of that term, which, indeed, is generally used only of retired officers and other ranks of the regular army who for a specified period remain on what is called "retired pay", the consideration for which is that they recognise a liability under certain conditions to be called back to active service. It is not a pre-requisite of enrolment in the Indian Army Reserve of Officers that they should, prior to such enrolment, have had any military experience at all. What happens is that after enrolment they are periodically subjected to a certain amount of special training. Many a person, therefore, so conditioned, might imagine that having stated his occupation and his pastimes correctly, he had given as full and sufficient a description of himself as was material. There are frequent instances in England of persons being killed in the hunting-field or accidentally shot by members of the same party when out after ordinary game. Sea-faring hobbies in like manner account for a good many deaths by drowning. In India man's primitive instincts lead many into circumstances of peril in pursuit of the larger wild animals. "Pig-sticking" and all that passes under the word "Shikar", regularly account for a number of accidental deaths.<sup>1</sup>

The above sketch of the field which the insurer will normally seek to cover for the purpose of obtaining the *data* he needs, must not be considered exhaustive of the picture. But it will at least afford the student reader some idea of the complexity of the problem with which an insurer is faced who seeks to arrive in each instance at a relatively correct estimate of the real extent of the risk he is asked to undertake.

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<sup>1</sup> Although the number of people in India who annually lose their lives by drowning is large, the *questionnaires* of many insurers seek no information from the applicant concerning his ability to swim.

**The prospectus.**—Sometimes a prospectus contains passages which have been construed as representing a contract offered which appears to have been varied when the policy is issued. In such cases it is possible to get the policy rectified so as to conform with the kind of contract offered in the prospectus, and which the assured is found as a matter of fact to have accepted. (*Wood v. Duvarris*, [1856] 11 Ex. 493; *Anstey v. British Natural Premium Life*, [1908] 24 T.L.R. 871.) Statements indicative in general language of the advantages or benefits which an assured might expect to get if he takes out a policy with the insurer who is issuing the prospectus are not necessarily to be construed as promises included in the contract. (*British Equitable, etc. v. Bailey*, [1906] A.C. 35.) For the contract in its final form to attract such statements at all, they must be representations under an identifiable scheme of insurance importing a specific advantage or benefit to which anyone taking out a policy of the kind described would be clearly entitled. Moreover, the assured must be in a position in all such cases to show that it was in reliance upon such statements that he applied for and took out the policy. (*Wheulton v. Hardisty*, [1857] 8 E.L. & B.L. 232.) Sometimes by a prospectus bearing a particular date, or by some other species of advertisement addressed to its policy-holders, an insurer may announce that he will grant particularly advantageous terms for the revival of lapsed policies, and that the more advantageous terms thus offered will be open to existing policy-holders as well as to new lives. In *Salvin v. James*, [1805] 6 East 571, it was held that where an existing policy-holder kept up his premiums on the faith of such an announcement, he was thereby accepting the general offer so made, just as much as if he had directly claimed the benefit of it.

In *Thiselton v. Commercial Union Assurance Co.*, [1926] 1 Ch. 888, the company's prospectus contained the following statement:—

*"Loans on policies—Loans are promptly made upon security of the Society's policies to very nearly the full extent of their surrender value. Interest is payable half-yearly at the rate of 4½% per annum, except when the loan amounts to £200 or more when the rate is only 4%."*

The plaintiff endeavoured to establish his right to obtain loans from the insurers at the rates specified in the above paragraph of the prospectus. Eve, J., held that the statement as to interest was made in the present tense and was no doubt a correct statement of an existing fact, but was not to be read as importing an agreement or even a representation that the rates would never be varied. In a recent Indian case, *Sun Life Assurance Co. of Canada v. Nirlatan Mookerjee*, [1938] 42 C.W.N. 1197, the plaintiff had sued for a declaration that in the case of whole-life policies the paid-up policy granted is usually for the total amount of premium paid as contained in page 14 of the *China Mutual Insurance Company's* prospectuses of 1919 and 1921, and "is operative, enforceable and binding on the defendant company with regard to the policy sued upon". The defendant company had taken over the business together with the liabilities of the *China Mutual Insurance Company*. A subordinate Court had made the declaration asked for. Panekridge, J., sitting with Derbyshire, C.J., in appeal, held the language of the prospectus to be inconsistent with any intention on the part of the insurers to enter into a binding agreement of the kind suggested with prospective policy-holders. He agreed with the learned Chief Justice that the prospectuses not being referred to in the policies could not legitimately be referred to in order to construe the contracts. It was not a case in which the

respondents had been seeking to rescind or rectify their contracts on the ground of fraud or mistake, nor yet to recover damages for alleged fraudulent misrepresentation. The Court followed the reasoning of Lord Lindley in *British Equitable Assurance, etc. v. Bailey*, [1906] A.C. 35, at p. 41, when that case was before the House of Lords, and applied the principle of construction adopted by Eve, J., in *Thisellon v. Commercial Union, ante*.

**Insurer's sources of information.**—Turning to the sources of information which are available to him there is (1) the assured himself, (2) the opinion of persons to whom the latter may consent to refer the insurer, and lastly (3) there is the opinion formed by the medical examiner appointed by the insurer, and to whose inspection the "life" must submit himself. These are the only avenues of information which affect the contract by reason of the doctrine of disclosure, informed as that doctrine is by the rule of good faith. It is thus not necessary for the purposes of the present discussion to refer to any confidential channels of information to which an insurer or his agents may have access.

The principles underlying the doctrine of disclosure and the rule of good faith oblige the proposer to answer every question put to him with complete honesty. Honesty implies truthfulness. But it happens that no man can do more than say what he *believes* to be the truth. It is, however, common knowledge that mankind is constantly, albeit honestly, in error; that, indeed, in an attempt accurately to describe his own physical, moral or mental condition a man is peculiarly the victim of erroneous ideas. That this is so depends not merely upon the more ordinary impediments in the way of self-observation, but, quite as often, upon the absence of sufficient general or special knowledge to which whatever may have been self-observed has yet to be related, if correct conclusions are to be drawn.

**How requisite information supplied.**—In practice modern insurers, as already observed, obtain their information through a number of carefully drawn *questionnaires*. They are commonly referred to as "forms", one of which is intended to be completed by the proposer and for that reason is usually styled "the Proposal Form" or simply "the Proposal". When the proposer is seeking to insure the life of another, a form embodying questions which the life himself must answer has also to be completed and signed by the life in the manner prescribed, which now-a-days invariably involves a concise statement in the form of a Declaration so drawn as in terms to assert the truth of the answers to the specific questions which the form contains. There are, next, one or two forms for the completion of which the medical examiner appointed by the insurer is held, in the one case partly, and in the other wholly, responsible. There are, lastly, forms intended for completion by private referees, to whom the life to be assured is content that the insurer should address pertinent questions.

What usually happens is that whatever agent is personally interested in putting through the particular transaction assists the proposer and the life (where the latter is not himself the proposer) correctly to answer the printed questions. The more experienced and better trained the agent, the more likely is an honest proposer to be able to do justice to the questions put to him.

The forms in the completion of which the medical examiner bears a part stand on a different footing. One of these forms must be signed by the life himself, and its purport is to record the answers which the medical examiner is expected to aid the life in giving correctly. The medical

examiner is always instructed to explain the questions (which are largely of technical medical significance) so that the life may fully comprehend the nature and point of the information which is thus sought of him; and the medical examiner is usually instructed himself to enter the considered answers which the life gives to the questions thus explained. This form usually concludes with a Declaration in similar terms to the one alluded to above; and the life is required to sign it. Sometimes, but by no means always, the form contains a space for a Declaration on the part of the medical examiner to the effect that he has explained the questions to the other declarant and has properly recorded the latter's answers. The second form with which the medical officer is concerned is one which has to be entirely completed by himself and must bear his signature. This form is intended to be a written record of the nature of his examination, which often includes the results of one or more clinical tests as well as his considered opinion and advice upon the desirability, from the insurer's point of view, of assuming the risk.

Lastly, there are the forms to be completed or the statements otherwise made by the private referees. These are often referred to as "the Private Friend's Report". Usually the covering letter to the private friend states that the person addressed is by the life expressly mentioned as one able to give information as to the latter's general state of health and concerning his habits of life. The addressee is informed that it is important for the proposer that every circumstance connected with his health and habits should be communicated. Finally the addressee is assured that his report will be treated as strictly private and confidential. The questions addressed to a private friend are rarely less than twenty.

**Persistence of duty to disclose.**—In considering the application of the rule of good faith to negotiations conducted by the foregoing methods the student must not suppose that the duty of frank and honest disclosure is in every instance discharged from the moment the individual concerned has appended his signature to the declarations required of him. For the interval of time which must elapse between (say) the completion of any one of the forms referred to, and the communication to an applicant that his proposal has been accepted, may, in certain circumstances, be considerable. If, then, at any time before his proposal shall have been accepted, the person whose life is to be assured falls ill, or so changes his occupation or is obliged or minded to expose himself to some hazard (not so far mentioned in the proposal form), it becomes the proposer's duty to acquaint the insurer with the altered circumstances; and if he does not do so, but, in spite of those altered circumstances, accepts a policy based only upon the earlier information, the insurer on learning of the alteration in the risk may, if it suits him, avoid the policy.<sup>1</sup>

For the protection of both parties and to prevent any such situation as the one just described developing through mere carelessness or ignorance on the part of the would-be assured, it is modern practice to require a further declaration to the effect that since the date of his proposal to the date named in the said further declaration the person whose life is to be insured has continued in sound health and that the declarant is unaware of any subsequent event or circumstance likely adversely to affect the risk. Naturally the making of such a declaration, when the matters stated therein are at variance with the facts, would on discovery of the true situation entitle the insurer to avoid the contract.<sup>1</sup>

<sup>1</sup> As to disputability under the Insurance Act, 1938, see pp. 434, 435, *post*.

On a joint life assurance policy on lives of a husband and wife, the latter was called upon to make a solemn declaration that since the proposal she had remained in good health; that she had been menstruating regularly since the last medical examination, and that the insurers incurred no more risk in now accepting an insurance on her life than at the date of the relative proposal. It was shown that in fact she knew that menstruation had stopped and that she was pregnant. It had been explained to her husband by the original canvasser that the insurers declined to accept proposals on behalf of pregnant women, whether singly or jointly with their husbands. The lady died in child-birth, and the husband sued on the policy. A bench of the Rangoon High Court, Roberts, C.J., and Leach, J., sitting in appeal, disallowed the claim. (*Maung Myat Maung v. New India Insurance Co., Ltd.*, [1937] 7 Comp. Cas. 265.) In that case, pertinent questions had been asked and untruthfully answered. But the state of the lady's health as a mere pregnant woman might not have struck her as an illness which in any event she ought to disclose, unless told, as here she was, that the particular insurer would not accept the lives of people in actual pregnancy. Indeed a woman in pregnancy, as such, if in a normal condition, would, in general, be considered in sound health. In *Anstey v. British Natural Premium Life, etc.*, [1908] 99 L.T. 16, affirmed by the Court of Appeal (99 L.T. 765), the facts were that ten years before taking out the policy the assured had had a miscarriage and a doctor had removed the *fœtus* from the womb. When applying for a policy the assured had answered in the negative a question thus framed: "Have you ever had any . . . illness or infirmity . . . ?" It was held that a miscarriage was not an illness or infirmity within the meaning of the question.

In illustration of the general rule, stated above, as to the continuing duty to disclose material matters up to the completion of the contract, the facts in *British Equitable Insurance Co. v. Great Western Railway*, [1869] 38 L.J. Ch. 314, may be briefly stated. The assured had been medically examined and had been accepted as a first-class life in the month of July. In the following month he became alarmed about his health and consulted a physician other than his ordinary medical attendant, who warned him that he was in a dangerous state of health, and prescribed for him. The patient kept silent over these circumstances. In September he paid the premium and obtained the policy. The receipt sent him indicated by an endorsement that it would be void if any variation should have taken place in the health of the assured since the date of his medical examination. Eight months later the assured died. There was no proof of what disease. The non-communication to the insurer of the assured's change in health and of his visit to the doctor was held fraudulent and to vitiate the policy. *Canning v. Farquhar*, [1886] 16 Q.B.D. 727, is another example of the application of the foregoing principle. A more modern instance is *Looker v. Law Union & Rock Insurance, etc.*, [1928] 1 K.B. 554.

**Rule applies to revived policies.**—The rule of good faith applies to policies which are revived, whether the insurer insists upon a fresh declaration or not. The reason is that a revived policy is, in contemplation of law, a new contract and, as such, attracts all the rules incidental to any other contract of life insurance. (*Handler v. Mutual Reserve Fund Life*, [1904] 90 L.T. 192, C.A.) That case has been followed and applied in India. (*India Equitable Insurance Co. v. Onkarappa*, [1934] 4 Comp. Cas. 424.)

The effects of misstatement amounting<sup>1</sup> to a breach of the rule of good faith have now been, it is thought, sufficiently explained. It remains briefly to touch upon the origin of statements upon which the insurers rely, and to indicate the various effects which incorrect information appearing in them may have upon the contract.

**Fraudulent misstatements.**—(1) *By proposer or by the life:* If the proposer or the life in answering material questions has deliberately made untrue statements, and by so doing has obtained a policy, his conduct will amount to fraud. A contract so made is, under the Indian Contract Act, voidable at the option of the other party: that is to say the insurer on being apprised of the true state of facts may, if it suits him so to do, treat the contract as not binding upon him.<sup>1</sup> Should he take that line the assured will forfeit the premiums paid. For since by means of deceit he has already exposed the insurer to risk, between the time when the protection was given and the discovery of the fraud, equity will not intervene to deprive the insurer of what has thus been earned. A stipulation as to forfeiture in these circumstances finds a place now-a-days in the policy itself.

(2) *By the private referee:* Should the private referee deliberately give untruthful answers to the questions put to him the contract will not on that ground be voidable, unless there has been a fraudulent conspiracy in furtherance of which the answers have been given. In such a case all the parties to it would be amenable to punishment under the Indian law of crime; and, moreover, would, where a policy had issued as a result of the deception practised, be jointly and severally answerable in damages at the suit of the insurer, if the latter should have been put to any expense in relation to the contract or have parted with money under it. Naturally the fact of the assured or the life being party to any such conspiracy would entitle the insurer to avoid the policy.

**Where referee a mere agent.**—Where there is no fraudulent intention behind a private referee's incorrect answers, neither party can utilise the incorrectitude of the information thus conveyed to the insurer as an excuse for avoiding the contract. For there is no obligation imposed by law on the private referee to give truthful or even careful replies to the questions put to him. This is so because the relationship between the insurer and the referee is governed by no contractual or fiduciary ties. But suppose the proposer or the life has supplied the private referee with untruthful information to pass on to the insurer in answer to the latter's questions, and that the referee should have carelessly, but because he trusted his friend, given his answers in terms of the information so supplied him. In such a case, if the real facts were to come out and the referee to disclose what had happened, the insurer would be justified in treating the referee as the mere agent of the proposer, and the statements made by the former to be misrepresentations made by the latter. Assuming such misrepresentations to be material in the particular instance, the insurer, on the principles already stated, would be entitled to avoid the policy.

**Medical examination and report.**—The position of the medical examiner is peculiar. He is primarily the agent of the insurer to whom he owes the duty of applying all his medical knowledge and experience in attempting to judge of the health of the person whom he

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<sup>1</sup> See Chapter II, pp. 41-43, *ante*. But see the limitations discussed at pp. 434, 435, *post*.

is called upon to examine. If, in consequence of his own want of skill, knowledge, industry or experience he fails to detect or correctly to appreciate some symptom of disease or abnormality, and for any or all of such reasons fails to acquaint the insurer with something which afterwards turns out materially to affect the risk, the insurer must take the consequences. He cannot on any such ground avoid his liability under the policy. In like manner, if the insurer towards acquisition and collation of necessary *data* requires the medical officer to put specific questions to the person whose life is offered for insurance, and to obtain and record the latter's replies, it is evident that an added responsibility is placed upon the medical agent, which he may or may not discharge for want of the necessary patience or care. There is no presumption that a medical examiner will either scrupulously or skilfully perform any of the duties allotted to him by his employer. Thus, the mere fact that the person examined has signed a declaration to the effect that the answers given by him to the medical examiner are true, will not in every case, of itself, be sufficient to throw the blame and the legal consequences of any inaccuracy wholly upon the shoulders of the life. For the person examined may be a woman or man of indifferent education. Where such be the case the question may well arise whether there was such an explanation of the questions put on the part of the doctor as to entitle the Court to take the relative answers seriously as the considered answers of a person who fully understood each question, and the significance and importance of each reply. Readers of Chapter II of this treatise will have noted the insistence which not only the Courts in India, but their Lordships of the Privy Council, have placed upon the duties which devolve upon a Court when asked to enforce the terms of a contract against someone who may well have been at a disadvantage compared with the other party in the matter of understanding the terms and significance of the arrangements to which he was giving his adhesion.<sup>1</sup>

It was not, however, until the twentieth century that the possible injustice to proposers by reason of the increasingly technical and difficult questions put became the subject-matter of judicial comment. A brief glance at the history of the matter will serve as an introduction to *Joel v. Law Union & Crown*, [1908] 2 K.B. 863, which we shall hereinafter refer to as *Joel's case*, and which proved a turning point in the law relating to non-disclosure.

**Warranties and representations.**—In early days the questions which a proposer had to answer concerning his health and habits were relatively few and relatively simple compared with what they are today. And the rule of good faith, applied with reasonable strictness, seemed at first to afford a sufficient protection to insurers. But it was not long before instances began to multiply indicating that the *data* thus being accumulated were not sufficiently exact to enable insurers to get reasonably close to a proper estimate of the risk. Moreover, there were disagreeable doctrines behind which a proposer could shelter who had provided a truthful account of himself, so far as that account went. Such, for instance, was the doctrine that questions which might have been but were not asked, entitled the proposer to assume that information on the subject-matter of such possible questions would be immaterial, and so not required of him. Another was that a proposer need not give information upon matters which the insurer must be taken to be aware of. To

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<sup>1</sup> See Chapter II, pp. 20-24 and 31-36, *ante*.

meet these difficulties insurers began, first of all, to extend the area covered by the printed questions; to give specific diseases or supposed diseases technical rather than popular names; and to insist on declarations by the proposers asserting the truth of the answers given. In view of the fact that Courts showed a disposition sometimes to read declarations asserting the truth of statements to mean no more than that the declarant in good faith believed in their truth and, speaking for himself, had no reason for entertaining any other belief, the insurers set themselves to stop up yet another loop-hole. This they did by so phrasing the declaration required of proposers that the effect was to make the latter warrant<sup>1</sup> the correctness in fact of the answers given; and they followed this up by obliging proposers to agree that the answers given and the declarations made concerning them should be the basis of the contract in virtue of which the policy issued. Thus, at long last, a misstatement whether material or immaterial, innocent or otherwise, in any of the answers covered by a declaration to the foregoing effect, became a breach of warranty entitling the insurer at his option to avoid the contract.

The immediate effect of this state of things is that where the questions and answers form the basis of the contract their materiality cannot be disputed by the assured, because the materiality of the topics covered by the answers has itself become immaterial. It is the correctness, not the materiality, which has been warranted. Such is the effect of a long chain of cases from *Anderson v. Fitzgerald*, [1853] 4 H.L.C. 484, through *Thomson v. Weems*, [1884] 9 A.C. 671, to *Glicksman v. Lancashire & General Assurance*, [1927] A.C. 139 and *Holmes v. Scottish Legal Life*, [1932] 48 T.L.R. 306. Nor will a verbal truth suffice if the statement behind it be untrue in substance. (*Holl's Motors, Ltd. v. South East Lancashire Ins. Co.*, [1930] 35 Comp. Cas. 281.) The above brief narrative of the events leading up to the modern forms of declaration is illustrated below.

In *Thomson v. Weems*, *supra*, the relative declaration by the proposer asserted the truth of his answers and recorded his agreement that the declaration and what it covered should be the basis of the contract, and that if any untrue averment had been made or any information necessary to be known to the insurer withheld, all premiums should be forfeited and the assurance would be null and void. The policy itself provided as much. The assured had been asked, when a proposer, whether he was temperate in his habits and whether he had always strictly been so. He answered both parts of the question in the affirmative. The evidence tended to show that he drank at least heavily, and that the disease from which he died is generally the result of prolonged indulgence in excessive alcohol. The case went to the House of Lords, where it was decided that in its plain and ordinary sense, the statement that the applicant was temperate is an averment of fact and not a mere assertion of the applicant's opinion or belief. Secondly, it was held that what was warranted was not the truth of the assertion according to the declarant's sincere conviction, but that the statement was true in substance and in fact. The fact having been found that the assured was intemperate rather than the opposite, the policy was avoided.

The facts in *Delahaye v. British Empire Mutual Life, etc.*, [1897] 13 T.L.R. 245, are instructive. There was a declaration covering the proposal form and making the answers appearing therein the basis of

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<sup>1</sup> See the definition and discussion of the words "warrant" and "warranty" in Chapter II, pp. 38-40, *ante*.

the contract, and in other respects similar to the declaration in *Thomson v. Weems*, *supra*. But there was no such declaration covering the answers which the assured had given to the medical examiner and which the latter had recorded, except that the proposer agreed that if the answers given to such questions were untrue the premium should be forfeited and the policy should be treated as null and void. The Court construed the declaration in its effect upon the proposal as essentially different from that part of it which affected the answers given to the medical examiner. The facts stated in the proposal were warranted as correct; but that the only requisition with reference to the answers to be made to the medical officer was to the effect that the assured should answer them to the best of his knowledge. There was a great difference between the answers appearing on the proposal and those which were required to be given to the medical officer, and the declaration must be so construed as to give effect to that difference. It was found, as of fact, that the assured, though he had answered some of the questions put by the medical officer inaccurately, had nonetheless answered them honestly. The policy was enforced.

In 1922 the case of *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413, was decided by the House of Lords, and in it the effect of making the proposal or any other document the basis of the contract is thus described: "The basis of a thing is that upon which it stands, and on the failure of which it falls; and when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance this must mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach. No doubt the stipulation is more concise in form than those which were contained in the policies which fell to be construed in *Anderson v. Fitzgerald* and *Thomson v. Weems*, in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue, the policy should be void; but I think that the effect is the same as if those words had been found in the present policy. Indeed it is remarkable that in *Anderson v. Fitzgerald*, Lord Cranworth referred to the above-mentioned provision, as to the avoidance of the policy if any of the statements in the proposal should be untrue, as a provision making those statements the basis of the contract; and in *Thomson v. Weems*, Lord Blackburn said: 'But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars . . . . . is warranted'. Lord Esher, in *Hambrough v. Mutual Life Insurance Co. of New York*, [1895] 72 L.T. 140, uses the word 'basis' in the same sense."

"Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the 'basis' clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties, it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered."

The principle thus enunciated has been accepted and applied in India. (*Oriental Government Security Life, etc. v. Narasingha Chari*, [1902] 25 Mad. 183; *Great Eastern Life, etc. v. Bai Hira*, [1931] 50 Bom. 124; *Lakmi Shankar Kanji Rawal v. Gresham Life, etc.*, [1933] 3 Comp. Cas. 52; *Light of Asia Insurance Co. v. Karatoya Debi*, [1935-6] 40 C.W.N.

1016; *Manufacturers Life Insurance Co. v. Haridasi Debi*, [1938] 42 C.W.N. 823.) In the last-named case the documents relied upon by the insurers contained at least one curious provision, namely clause 4, and it was fortunate for the insurers that they had a strong enough case on the facts to be able to plead fraudulent misstatements; for on the latter plea they succeeded. The provision alluded to was contained in the first sentence of a clause headed "incontestability"; but it was not the effect of such a provision which presented the difficulty recognised by the Court. The first sentence of the said clause was thus worded:—

*"This policy is issued in consideration of the application therefor, a copy of which is hereto attached, and of the statements and agreements therein contained, and together with the application constitutes the entire contract and is based on statements made by the insured, which shall, in the absence of fraud, be deemed representations and not warranties."*

Having regard to the effect of making the contract based on specified statements made by the assured—which the authorities above alluded to treat as amounting to a warranty—Pancridge, J. (at p. 826), not unnaturally, found "the stipulation that the policy is based on statements made by the assured...difficult to reconcile with the qualification that the statements shall, in the absence of fraud, be deemed representations and not warranties".

We have now to examine cases in which the answers given by an assured either to the questions put to him directly or through the medium of the insurer's medical examiner have *not* been made the basis of the contract. In all such cases there must be a breach of the rule of good faith by concealment of a material fact a knowledge of which would have affected the mind of the insurer, or the statements made must be in themselves untrue and fraudulent, if the contract is to be avoided. The concept of fraud involves materiality; for deceit in a matter wholly immaterial to the contract would be within the maxim *de minimis non curat lex*<sup>1</sup>. The decision in *Joel's case*, *ante*, and *Mutual Life Insurance Co. of New York v. Ontario Metal, etc.*, [1925] A.C. 344, are now the leading cases on the effect of representations which are neither expressly nor by implication to be classified as warranties.

The material facts in *Joel's case* were as follows: Some eight years before effecting the insurance sought to be enforced, the assured had been attacked with influenza. This gave rise to severe and increasing mental depression culminating in acute mental derangement. A certain doctor S. who had been attending her advised her to consult doctor K. which she did. On mania developing, she was admitted as a patient into a private asylum maintained by a doctor L. It was in evidence,—and the evidence seems to have been accepted,—that the assured was unconscious of her real condition when an inmate of doctor L.'s home; and that her true condition had never been revealed to her. She was in due course discharged from doctor L.'s asylum and did not die till nearly 11 years afterwards. She did, however, die by her own hand. It happened that the medical examiner appointed by the insurers was own brother to the doctor S. mentioned above.

As usual, the questions asked of the assured during the negotiations for the policy were divided between the form which she had to fill up and that which the medical officer would fill up for her. To each of these forms was appended a separate declaration which the proposer had

<sup>1</sup> "With mere trifles the law does not concern itself."

duly signed. On the proposal form the declaration ran: "I do declare that to the best of my knowledge and belief the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the company." The other declaration which appeared at the foot of the medical examiner's form read: "I do hereby declare with reference to the proposal for assurance on my life and my declaration dated October 30th, 1902, that the answers to the foregoing questions are true." The policy finally issued did not refer to either of these declarations, nor indeed to the proposal as such. In the questions put to the proposer through the medical examiner the following with the proposer's answers were relied upon by the insurers in resisting the claim:—

"(7) *What medical men have you consulted? When? And what for?*

*Ans. Dr. S., rarely, colds; Dr. H., last spring, measles.*

(9) *Have you at any time had, and if so, when, any of the following ailments . . . (b) . . . Mental derangement, brain fever, or other disease of the brain?*

*Ans. No."*

There was no stipulation making her answers the "basis" of the contract. The question was one of warranty based on the declarations.

The case was tried by the Lord Chief Justice and a special jury. The jury having found, as of fact, that the assured did not know that she had suffered from mental derangement; that she had foolishly, but not fraudulently, concealed the fact that she had consulted Dr. K. for nervous depression; but that such a consultation for such a cause was material for the insurance company to know in considering whether they would insure the assured's life; the learned Chief Justice entered judgment for the insurers. The Court of Appeal held that although the terms of the first declaration did not exclude the possibility of the truth of her answers to the questions attracted by the second declaration being material to the validity of the policy, yet, having regard to the nature and purpose of the questions put through the medical examiner, the truth of the answers to them was not, on the true construction of the documents, made part of the basis of the contract.

The matter was to some extent complicated by the procedure adopted by the insurers in not calling the medical examiner who (the Court of Appeal noted) had been present throughout the proceedings. In reference to the foregoing fact the Court held that, under the circumstances, without the evidence of the doctor who put the questions to the assured as to what took place when he so questioned her, her second declaration was not, *per se*, sufficient evidence to prove that there had been any such non-disclosure of material facts by the assured as would, in the absence of fraud, render the policy voidable. In that connection the Court expressed itself as not satisfied that the assured had concealed anything from the medical examiner who might, for aught they knew to the contrary, have learnt from his brother Dr. S. that the assured had consulted him for a nervous breakdown. In the result the Court of Appeal ordered a new trial.

*Joel's case*, however, is likely to become classical for reasons other than those set out above. For there are passages in the judgment of Fletcher-Moulton, L.J., which have been constantly cited since as exemplifying how easy it may be to misjudge the honesty of proposers where the latter find themselves faced with difficult questions the full import of which they may not be aided to grasp.

"To make the accuracy of these answers a condition of the contract is a contractual act, and if there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information that he is consenting thus to contract, we ought to refuse to regard the answers given as being conditions. In other words, the insurers must prove, by clear and express language, the *animus contrahendi*; it will not be inferred from the fact that questions were answered, and that the party interrogated declared that his answers were true."

And again,

"It is plainly the duty of the court to require the insurers to establish clearly that the assured consented to the accuracy and not the truthfulness of his statements being made a condition of the validity of his policy. No ambiguous language suffices for this purpose."

The Lord Justice is here calling attention to the different effect in law between warranting the *accuracy*, and warranting the *truthfulness*, of an answer; and the whole drift of his observations upon this topic is to emphasize that unless the proposer first of all appreciates the distinction between accuracy in fact and mere truthfulness on his part, and, secondly, the wholly different consequences which follow from warranting the one from those which attend upon warranting the other, the *animus contrahendi*, i.e., the will to be bound by the legal consequences whatever they are, will not be there. This is but to apply the doctrine of *consensus ad idem*.<sup>1</sup> For if the warranty relied on means one thing to the insurer and another to the assured the parties are not agreeing to the same thing in the same sense. In which case the term of the contract apparently acceded to is, in fact, not agreed upon at all either in the eye of law or in that of equity.<sup>2</sup>

The foregoing *dicta* raise two separate questions each of great importance. The validity of much of Fletcher-Moulton, L.J.'s reasoning depends upon there being a real distinction, for the purposes of such a contract, between the *accuracy* of a statement and its *truth*. The first question, then, would be: is there such a distinction? No one but knows that in ordinary conversation a person who says "that is correct" or "that is true" is obviously using the words "true" and "correct" as interchangeable epithets. He is plainly *not* distinguishing between the two notions. And there is a substantial body of authority for the doctrine that unless there is something in the phraseology or the context to suggest otherwise, where persons enter into contractual relations subject to a condition that a particular statement is true or accurate, those words will, for the purposes of the construction of the contract, bear their ordinary meaning. That, however, it is submitted, is not enough to invalidate the view to which Lord Moulton (when Fletcher-Moulton, L.J.) gave expression in the passages cited.

The real question to which he addressed himself was the interpretation to be put upon the words "true" and "accurate" where they are used with reference to answers given by a man or a woman about his or her health. A judgment is only an authority for what it decides; and even *obiter dicta*, unless plainly designed for the most general application, have to be understood in reference to circumstances akin to those which

<sup>1</sup> See Chapter II, pp. 29-31, *ante*.

<sup>2</sup> There is also the healthy doctrine—which informs Fletcher-Moulton, L.J.'s pronouncements on this kind of warranty—derived from the law's recognition that it has a duty to uphold the sanctity of a contract and that a clause which is relied upon to avoid it will be construed strictly *contra proferentem*.

call them forth. It is submitted that when a person first of all states that he has never been ill, or never suffered from one or more specific disorders mentioned in a particular question, and follows up that statement by declaring that what he says is true, he never means, and no court should deem him to mean, anything more than that in his honest belief he has never been ill according to his honest notion of what a condition of illness is, or, in regard to specific diseases, that he is honestly unaware of any symptom pointing thereto. It would follow from this that in reference to such questions for the purposes of such a contract a warranty of mere truthfulness is something quite different from a warranty of accuracy in substance and in fact. How many people, it may be asked, ever mean to asseverate by such a warranty that they are not suffering from a wholly undisclosed and unrevealed disease? How many orphans who may be so positioned as to have no record of their medical history earlier than their sixth or seventh year (behind which their memory may not stretch) would, if their attention were pointedly to be called to the import of a declaration that they had never suffered from specific disorders, be ready to swear to something they could not know?

Said Fletcher-Moulton, L.J., elsewhere in the same case: "The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends upon the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognised that the knowledge in question was material to disclose, it is no excuse that you did not recognise it. But the question always is, Was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with almost all of us, occasionally a headache. It may be that a particular one of those headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now, no reasonable man would deem it material to tell an insurance company of all the casual headaches he had had in his life, and if he knew no more as to this particular headache than that it was an ordinary casual headache there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action."

The second of the questions raised by Fletcher-Moulton, L.J.'s observations is of equal importance. It may be thus phrased: Do the *dicta*, in effect, lay down a principle in virtue of which an *onus* would be cast upon every insurer, seeking to avoid a contract of life insurance on the ground of a breach of a warranty, to show that the assured fully realised what he was doing when he made the declaration or declarations relied upon? It is submitted that the *dicta* do not go so far; and that a Court in India ought not to proceed upon the supposition that they do. It must be borne in mind that in *Joel's* case the life insured was that of a woman, and upon the particular facts the whole Court expressed itself as far from satisfied that she had had sufficient explanation of what ought to have been explained to her by the doctor. She died before the trial, a fact which rendered it all the more imperative for the defendants to call their medical examiner, which they did not do. Such a situation would not ordinarily be created in the case of an endowment policy. But in whole-life policies contests arising out of a defence which rests upon

alleged misrepresentations or breaches of an express warranty arise out of claims made when the life has dropped. Accordingly, where that life is shown to have been a woman, or an illiterate person, or a young man of not much education, or one whose life is being insured at the instance of another who has taken a large part in persuading him to undergo medical examination (possibly for reasons of his own), it may well be argued that the court ought not "to infer" that a person so placed had the *animus contrahendi* in respect of a particular warranty from the mere fact "that questions were answered and that the party interrogated declared that his answers were true". In this connection it has to be remembered that the rule of good faith is not to be applied unilaterally. Both parties to a contract of insurance are bound by it. And indeed the application of the rule at all to such contracts shows that equity, from which the rule derives, preserves an ever-watchful guard over them.

Thus, it is submitted, that if a person of adult age, of the male sex, and of apparently good understanding, and of a sufficiency of education to appreciate the particular questions and answers without much explanation, chooses to take upon himself to declare his answers to be true, when, in fact, he at best only supposes that they may be, and thus does not really know whether they be true or otherwise, it is not the rôle of equity to afford him shelter behind a doctrine apt only for the protection of the ignorant or the uninstructed.

In India where there are a large number of people with little or no knowledge, not merely of the nature of diseases as modern medical science classifies them, but of the language in which the relative questions appearing in proposals and medical reports are ordinarily cast, it may well be that the only fair and safe thing is to incorporate a declaration by the agent, if he has assisted in completing the proposal form, and by the medical examiner, to the effect that they have respectively explained with care the questions and the implications of the questions put to the proposer, and that he or she has understood them. A declaration by the life proposed to the effect that the questions *have* been explained and *are understood* might well be incorporated in, at any rate, the form which the medical examiner has to complete. The suggestion is made for the protection of both parties. In the one case it would, in the absence of established fraud, effectively bind the assured, so long as the declaration required of the latter be not only in English but in the appropriate vernacular. It would also protect the honest proposer inasmuch as such a man could refuse—unless wholly careless, when he must take the consequences—to sign such a declaration unless and until the questions should have been explained to him to his satisfaction.

As to the form of declaration to be used as a warranty, it would seem that the only fair way of obtaining an assured's signature to statements which are designed to create warranties in relation to numbered questions and answers, would be to distinguish between statements declared to be strictly true in substance and in fact, and those made in the honest belief that they are true. For evidently an honest person can warrant as strictly accurate that such and such a doctor attended him or that he has so many children; or that his occupation is this or that. But it is quite another matter to warrant the accuracy of the fact that there is no disease from which he may, quite unconsciously, be suffering.

In 1925 the Judicial Committee of the Privy Council had before it the last-named of the two leading cases alluded to above: *Mutual Life*

of *New York v. Ontario Metal Products*. This case fell to be decided in large measure with reference to the then existing law of the province of Ontario in Canada. Included in the statute law of that province was, and still is, an act known as the Ontario Insurance Act, which renders it impossible to avoid a contract of insurance on the ground of a mere misstatement unless the same shall be material. Moreover, a proposal is not to be deemed part of the contract unless it contains a material representation which wholly or in part induces the contract. To comply with the requirements of the statute the policy in suit contained a clause to the effect that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties". In an action on the policy the company sought to escape liability on grounds of misrepresentation and concealment of material facts. Fraud was not alleged. They relied upon answers given by the life to certain questions in the proposal form. The questions and answers so relied on were as follows:—

"What illnesses, diseases, injuries or surgical operations have you had since childhood?" Ans.: "Trivial ailments."

"State every physician or practitioner who has prescribed for or treated you or whom you have consulted in the past 5 years?" Ans.: "None."

From the evidence it appeared that a certain Dr. Fierheller, who had been attending the assured's wife, had on certain occasions given the assured an injection as a form of stimulant when the latter had felt overworked. No evidence of specific ailments was tendered.

By their judgment their Lordships laid down the following matters of doctrine which, it is submitted, the Courts in India would treat as of general application. When statements made by an insured person upon his application for a policy of life insurance are not made the basis of the contract, but are to be treated merely as representations, an inaccurate statement is material so as to vitiate the policy if the matters concealed or misrepresented, had they been truly disclosed, would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. It would not be sufficient that they would merely have caused delay in issuing the policy, while further enquiries were being made. On the matters of fact and the mixed questions of law and fact in contest between the parties, their Lordships held that the answer to the question as to illnesses was true; and that, upon the evidence of the medical examiner himself, had the insurers learnt the name of Dr. Fierheller they would merely have made enquiries from him: and that the knowledge so acquired as to the tonic injections would neither have affected the acceptance of the risk nor have caused the insurers to ask a higher premium. Accordingly the undisclosed fact was immaterial, and the defence in the action failed. In *Oriental Government Security Life, etc. v. Narasingha Chari*, [1901] 25 Mad. 183, the Court applied the same reasoning to one of the pleas taken.

**Copies of proposal and medical report.**—It has long been customary with reputable insurers to supply holders of any of their life insurance policies with a copy of the proposal form as filled up by the assured as also with a copy of the medical report as completed by the examiner and signed by the life assured. It is now obligatory, however, upon every insurer who is amenable to the Insurance Act, 1938, to supply on demand by a policy-holder and for a fee not exceeding one rupee certified copies "of the questions put to him and of his answers thereto

contained in his proposal and in the medical report supplied in connection therewith".<sup>1</sup> The section reads as if a policy-holder who is not the life assured will not be so entitled to copies. Sometimes the copies provided are given free, and a statement that a copy of the proposal form and/or the medical report has been so supplied appears in the policy itself. An excellent plan, adopted by some insurers, is to supply such copies in the form of photographic reproductions of the originals. This is a great advantage not only to those originally interested in the taking out of the policy, but to assignees to whom the rights thereunder have been transferred, and who can, at a glance, determine for themselves whether the life assured has himself or herself filled up any and which part of these documents. It is conceived that what is referred to in section 51 of the Insurance Act as "the medical report" means the form which contains the life assured's own answers to questions put by the medical examiner. The other medical report, to which reference has been made earlier in this Chapter,<sup>2</sup> is a confidential document passing between the medical examiner and the insurers in the capacity of their medical adviser.

## 6. *The Policy and its conditions.*

**Preliminary.**—Policies drawn on the older models begin with what is called a "recital". Then follows the operative clause, bearing testimony to what the insurer undertakes to do. This part of the instrument sometimes expressly attracts the information to be found in what is called the "Schedule". The instrument usually continues with one or more "provisos", whereby the liability created by the operative portion is qualified or cut down. All such provisos have the effect of making the liability conditional upon the stipulations which they embody being fulfilled. Such provisos are themselves conditions, either "precedent" or "subsequent".<sup>3</sup> Sometimes a proviso is so framed as expressly to attract other conditions, which latter are usually printed on the back of the instrument.

At the head of the instrument is usually placed the number of the policy for purposes of reference, and a statement of the sum assured. Some forms, however, give the policy number and the statement of the sum assured in what is now-a-days termed the "Schedule". Somewhere upon the face of the instrument will appear a form of words showing whether the policy entitles the person taking it out to full or limited benefits thereunder, *e.g.*, whether it entitles the holder to participate in profits and/or to accident benefits.<sup>4</sup>

The Schedule is itself a form, usually printed upon the face of the instrument. It is divided into suitable spaces by vertical and horizontal lines and is designed to give, at a glance, such information as the name, residence and occupation of the assured, together with similar information concerning the life assured; the date when the risk attaches; a statement or re-statement of the amount assured, and to whom and where it is payable; particulars concerning the premium, such as the amount and the date or dates when due, and how payable. Commonly the Schedule will also contain the date of the Proposal and of any Declaration

<sup>1</sup> By sec. 51. See Appendix I, p. xxix, *post*.

<sup>2</sup> See pp. 397, 398, *ante*.

<sup>3</sup> As to the concept of a "Condition" and the provisions of the Indian Contract Act which apply generally, see Chapter II, p. 41, *ante*.

<sup>4</sup> In modern policies of life insurance the offer of accident benefits is rare.

and by whom the same have been made; and like information as to the answers given to the medical examiner. It is useful if it also set out the date given by the life assured as that of his birth, and whether the correctitude of that date or the age of the life as at the date of the proposal, be admitted or not. There is commonly a reference to any conditions imposed by the policy as to residence, occupation or foreign travel. And one almost invariably finds a space reserved in the Schedule for a reference to "special" conditions. Such special conditions are usually endorsed on the back of the instrument: unless they be so few, or are capable of being quite briefly expressed, when they may be stated in the space provided in the Schedule itself.

The policy, to be binding on a corporation limited by shares, needs to be signed by someone properly authorised to bind the company to such a contract. Usually any member of the board, who may be a local director, has the requisite authority under the Articles.

For the insurer's protection in the matter of correctly filling up such portions of the instrument as are not printed, the policy usually bears the signature of someone styled "The Manager" and, often enough, other signatures, namely of those whose duty it happens to be to certify that the instrument correctly sets forth all the terms agreed upon between the parties.

If there has been prior cover given to the assured, the instrument may bear the date of that cover.<sup>1</sup> In any case the risk attaches from whatever date the instrument bears, unless otherwise shown on the face of the policy.

A policy may be invalid for want of the proper stamp as required by the revenue law.<sup>2</sup>

Besides the endorsement of any special conditions, a policy which is purported to be assigned is usually endorsed with a statement of that fact together with the material particulars. But under the law of India such endorsement is not essential, it being permissible to assign a policy of life insurance by a separate instrument in accordance with the provisions of section 38 of the Insurance Act.<sup>3</sup>

**Construction.**—What has been said earlier in this treatise as to canons of construction with reference to other forms of insurance contracts applies to contracts for assurances on lives.<sup>4</sup> The law to be invoked for the purposes of such construction is the law of India. As already pointed out elsewhere in connection with this topic, a construction according to the law of India may be claimed by a policy-holder, on contest, by virtue of the provisions of section 46 of the Insurance Act, 1938.<sup>5</sup> It may be added that while Courts in India as in England lean towards a construction which will validate rather than one which would invalidate a contract, they treat as of no effect anything which is in aid of an unlawful object or which would be opposed to public policy. If in such a case the offending term or terms may be severed, without making the contract unworkable, the Court will uphold the balance of the agreement between the parties.

<sup>1</sup> More often cover of this kind is provided by what is known as an *interim* policy.

<sup>2</sup> Indian Stamp Act (II of 1899).

<sup>3</sup> As to assignment of life policies, see Appendix I, pp. xxiii and xxiv, *post*, and the discussion later in the present Chapter at pp. 452-455, *post*.

<sup>4</sup> See Chapter IV, pp. 131-140, *ante*.

<sup>5</sup> See Appendix I, p. xxvii, *post*.

**Form.**—As a specimen of a recital in a policy issued by a well-known and long-established insurance concern in India the following has been transcribed from an inset in the undertaking's own prospectus:—

*WHEREAS the Insurer has received a Proposal and Declaration for Assurance which Proposal and Declaration with the statements contained and referred to therein the Proposer named in the Schedule hereto has agreed shall be the basis of this Assurance, and has received the first Premium for an Assurance of the amount and on the terms stated in the said Schedule.*

The above recital is, in the form of policy here reviewed, followed by an operative clause so framed as to be itself conditional. It expresses the consideration partly by attracting what is stated in the recital and partly with reference to the expected performance by the assured of what is due from him *in futuro*. It is thus worded:—

*NOW THIS POLICY WITNESSETH that in consideration of the premises and on condition that there shall be duly paid to the [Insurer] the subsequent Premiums as stipulated for in the said Schedule, the [Insurer] will upon proof to the satisfaction of its [Management] that the Sum Assured has become payable in terms of the said Schedule, be subject and liable to pay the amount thereof, but without interest, to the person or persons mentioned in the said Schedule as entitled thereto.*

In the policy under review the foregoing provisos are followed by yet another rendering payment under the policy conditional upon prior proof of age of the life assured,<sup>1</sup> and of the title of the person or persons claiming payment.

All the foregoing provisions may, as a matter of form, be compared with another type of policy in use in India by another old-established insurance undertaking. It is boldly headed with an address indicative of the place where any notice of assignment must be given. It will be seen that the more old-fashioned form of recital is dispensed with, and that the instrument begins with a concise statement of the consideration and the corresponding liability undertaken, with which is combined a statement of the basic condition of payment. The whole passage referred to reads as follows:—

*THIS POLICY OF ASSURANCE granted by the [Insurer] WITNESSETH that in consideration of the payment already made to the [Insurer] of the first premium or first instalment thereof as stated in the subjoined Schedule for the Assurance the particulars of which are stated in the said Schedule and of the subsequent premiums or instalments of premiums if any to be paid as thereby provided the [Insurer] doth hereby agree that upon proof satisfactory to the [Management] of the happening of the Event or Events on which the Sum Assured is to become payable as described in the said Schedule and of the title of the Claimant or Claimants the [Insurer] will pay the sum stated in such Schedule as the Sum Assured to the person or persons to whom by such Schedule the same is made payable.*

Equally concise is the next clause framed as a composite proviso to the first. There are no other provisos. The passage alluded to reads as follows:—

*PROVIDED ALWAYS (1) That the Proposal and Declaration and the Answers mentioned in the Schedule shall be held to form the basis of this contract and (2) That this Policy shall be subject to the several Conditions hereupon endorsed which are to be deemed part of the Policy.*

<sup>1</sup> See the common stipulation as to proof of age discussed at pp. 414–417, *post*.

By the foregoing proviso there are directly attracted all endorsements by way of conditions which may appear anywhere upon the instrument. In the particular instance the printed endorsements, headed "privileges and conditions", are seven in number and appear on the reverse of the instrument.

In the first-named specimen to which reference has been made above, the provisos appearing on the obverse of the policy number four, and the privileges and conditions set out on the reverse amount to fifteen. Prominent among the said provisos is one which may for convenience sake be termed a combined warranty and forfeiture condition. It reads as follows:—

*PROVIDED ALSO that in case the said Premiums shall not be duly paid as aforesaid or in case any special condition endorsed hereon shall be contravened, or in case it shall hereafter appear that any untrue or incorrect averment is contained in the Proposal and Declaration above mentioned, or any fact in the statements referred to therein, has not been truly and fairly stated, or that any material information has been withheld, then and in every such case, this Policy shall be void, and all claim to any benefit in virtue of these presents shall cease and determine, and all monies that have been paid in consequence thereof shall belong to the [Insurer] excepting always in so far as relief is provided in terms of the Privileges printed on the back hereof, or may be lawfully granted by the Directors.*

It will be observed, when comparing the foregoing provisions of the two forms of instruments under consideration, that both expressly attract the relative proposals and declarations made by the assured and seek to make them the basis of the contract. The word "Answers", appearing in the proviso on the obverse of the policy conspicuous for its brevity, has reference to something appearing in the Schedule. The only passage in the Schedule relating to any answers is in the space designed for the insertion of the date when answers to questions put by the medical examiner were given. There is no reference to any declaration other than the one covering the proposal. Thus, in order to determine the effect of such warranties as the assured may have given in respect of the medical questions only, much may depend upon the phraseology used in some further declaration: unless, of course, the declaration appended to the proposal shall have been so drawn as to cover the answers given to the medical examiner as well.

Adverting to the first of the two policies under examination, it is to be observed, from what appears on the obverse side of the instrument, that the assured has expressly agreed to the avoidance of the policy, to have no claim to benefit under it, and to forfeit all premiums, if any statement in the proposal or declaration or in any other statement referred to therein shall be "untrue" or "incorrect" or has not been "fairly stated" or if any "material information has been withheld". Assuming the declaration thus attracted to have been drawn on normal lines the effect of any breach of this condition must be to render avoidance of the contract and forfeiture of premiums inescapable save on the ground of fraud, duress, undue influence, or some fundamental mistake so going to the root of the whole contract as to indicate that the parties thereto were never *ad idem*.<sup>1</sup>

There are other topics attracted by the provisions of the various conditions, to which the reader's attention has been called in the foregoing

<sup>1</sup> For the effect of "coercion", "undue influence" and "mistake", see Chapter II, pp. 31-36, *ante*.

specimens, which need separate treatment, and these topics will accordingly be briefly dealt with under appropriate headings hereunder.

Taking these topics in their logical order they may be dealt with under "Proof of age", "The agreed contingency", "Claimant's title", and "Privileges".

**Proof of age.**—The importance of establishing the correct age of the life insured has been alluded to in the early part of this Chapter. All policies of life insurance now-a-days insist upon what they call "satisfactory proof of age", or "proof to the satisfaction of the insurer's directors", as a condition precedent to payment of the policy monies. The proof required may thus be adduced at any time, from some stage in the original negotiations to some date after the life has dropped, or, in the case of endowment policies, after the age contemplated by the instrument has been attained. But the nature of the stipulation is that no claimant under the policy will get anything unless and until the "proof" (so-called) as to age shall have been adduced and accepted. A stipulation as to proof of age which is so framed as to make compliance with it a condition precedent to recovery under the policy is unaffected by the provisions of section 45 of the Insurance Act, 1938.<sup>1</sup>

Neither of the policies under examination present any exception to the practice alluded to. The first of them, by the terms of the second proviso appearing on the obverse side of the instrument, expressly demands such proof. In the other policy the relative stipulation appears as No. 6 of the printed "conditions", set out on the reverse of the instrument, and is of course attracted by clause 2 of the composite proviso appearing on the obverse side of the policy. The condition alluded to is thus worded:—

*"Satisfactory proof of the date of birth of the Life Assured must be furnished before any payment is made by the [Insurer] under the Policy. If at any time the age should be found to have been understated in the Proposal, the reduced amount assured by the Premium actually paid (with a corresponding deduction in respect of Bonuses, if any) will alone be payable under the Policy, whether such understatement should have previously come to the knowledge of the [Insurer] or not. Age will be admitted on the Policy at any time on satisfactory proof of the date of birth as stated in the Proposal being given."*

As a matter of law, "proof", as required in the Courts of India, is the subject of express definition in the Indian Evidence Act.<sup>2</sup> What, however, both contracts insist upon is not necessarily legal proof, but proof to the insurer's own satisfaction. Justice, equity and good conscience will, however, protect those entitled to the policy monies from being kept at arm's length by insurers under an affectation of dissatisfaction with evidence tendered as to age, when, in the eye of equity, such evidence ought to be regarded as sufficient. A single example must suffice.

In *Sm. Umarani Bose v. Modern India Life Insurance, etc.*, [1937] 7 Comp. Cas. 199 (referred to earlier in the present Chapter),<sup>3</sup> there were six policies in suit, aggregating in value Rs. 3,000. They had been taken

<sup>1</sup> The limitations imposed by sec. 45 of the Insurance Act, 1938, are discussed later in the present chapter under the Caption "Indisputability". See pp. 433-436, *post*.

<sup>2</sup> Section 3. The section is set out at p. 296, *ante*.

<sup>3</sup> See p. 372 (note 4), *ante*.

out by the plaintiff's husband. The claim was by the widow. On the death of the assured being notified to the insurers together with the widow's claim to the policy monies, the insurers sent her certain forms to be completed, apparently of the usual kind, and asked for certain documents. According to the facts, as found by the learned Judge, all the requisite information was given. There had been forwarded a certificate of identity. That had been completed in the presence of, and signed by, a magistrate. The certificate of death was over the signature of the medical practitioner in attendance upon the life when he died. There was an employer's certificate, as well as another signed by the proper authority of the University of Calcutta as to the age at which the assured had matriculated there in 1911. All these documents were corroborative of the age which was in question, namely that the assured was about 44 when he died. This tallied sufficiently with the age as given by the life himself when effecting the insurance. The insurers, however, purported to be dissatisfied with the foregoing evidence, and issued a number of further interrogatories. The case was not made the easier for the defendants in the action, having regard to the fact that the assured was one of their own medical officers, and that the age which he had given when appointed by them corroborated the plaintiff's case on the point. The Court held that the company "ought to have been satisfied with the proof of age submitted to them", inasmuch as the plaintiff had tendered to them "reasonable evidence" of the age.

The kind of evidence acceptable for the purpose of establishing age under a policy of life insurance recently fell to be considered by a bench of the Calcutta High Court, sitting in appeal from an original decree. (*Allianz und Stuttgarter Life Insurance Bank v. Hemanta Kumar Das*, [1938] 42 C.W.N. 855.) The material facts were that the policy was issued on the 16th of February, 1934, and a day later the insurers returned to the assured a horoscope which he had sent them in support of his statement as to age. The policy contained a condition providing that the age stated in the application must be proved to the satisfaction of the company before any claim under the policy could be paid. There were certain instructions to the insurer's agents which read: "*however, in the case of male proponents above 45 years of age and in the case of all female proponents, the evidence of age must as a rule accompany the proposal for assurance. The scrutiny of the age cannot be undertaken until the proof of age has been accepted by the company.*" The instructions then concluded with a paragraph in the following words:—

"*The company recognises as proof of age school or university certificates, extracts from service book or official birth register and only in the absence of the above proofs, horoscope or entry in family Bible. In the case of horoscopes, however, the company retains a right to scrutinize them according to its own standard as to their liability and may insist on a supplementary proof, if it is not satisfied; it goes without saying, however, that an old genuine horoscope would, if in order, be accepted as final proof of age.*"

The company, after scrutinizing the horoscope alluded to above, and returning it, then endorsed the policy with an admission of the age. The Court held that in the absence of any evidence that the admission thus endorsed upon the policy had been obtained by fraud, the insurers were bound by it. A similar view of the effect of such an admission was taken by the High Court of Bombay in *Maneklal Kalidas Shah v. Yorkshire Insurance Co.*, [1939] A.I.R. Bom. 161.

Where by the contract an insurer has imposed upon the assured and those claiming under him the obligation of proving the age of the life to the insurer's satisfaction as a pre-condition to payment under the policy, the presence of an indisputability clause in the contract in the usual form—namely that the policy will not be disputed on any ground save that of fraud—does not constitute an admission of the age which the assured has warranted, nor does it otherwise relieve him or the claimants from proving age if, prior to the claim, no such proof has been tendered and accepted. The effect of an indisputability clause is only to relieve the assured from the legal consequences which, otherwise, a breach of the warranty as to age would entail. (*Oriental Government Security Life, etc. v. S. C. Chatterjee*, [1895] 20 Bom. 99.)

In the *Allianz* case the Court had been referred to *Brierley v. Brierley and Williams*, [1918] P. 257, and *In the Estate of May Goodrich deed.*, [1904] P. 138, where it was held that an entry in the register of births, deaths and marriages is by statute *prima facie*, but not conclusive, evidence of all the facts required by statute to be entered therein. It was recognised that in the case of such registration in India there was no such specific statutory inference. But it was argued—and the Court accepted the view—that since entries of that kind in registers maintained by public officials or by municipal bodies, the creatures of statute, were made in the performance of public duties, the maxim *omnia praesumuntur rite esse acta*<sup>1</sup> applied, and that consequently once the relative entries themselves have been proved, the facts sought to be established by them are treated as proved, unless the presumption of their accuracy be rebutted. It was conceded in argument that there must be some evidence of identity as to the individual named in the records tendered. It is elementary, however, that such evidence may be direct or circumstantial.

Earlier in the present Chapter reference has been made to the need for a greater degree of governmental insistence upon the proper registration of births, marriages, and deaths throughout British India. It is the unsatisfactory nature both of the present law relating to such registration, and the lack of proper and sufficient control over the system,—such as it is,—which so often renders it necessary for individual citizens of India to rely upon a horoscope as evidence of age.

The value of a horoscope for such a purpose may, in the case of some readers, need a little explanation.

Horoscopes may be drawn at any time. Such information as they purport to give with regard to an individual's future depends entirely upon the accuracy of the facts concerning the date and hour of birth with which the astrologer has been provided. The document, therefore, does not purport to *prove* the date of a birth, but, on the contrary, *seeks* to foretell dangers, upon the *assumption* that the date of birth given is true. The best that can be said, therefore, of a horoscope as evidence of age, is that if it purports to have been drawn shortly after birth, and was in fact so drawn, the information given as to the date and hour when the child was born might reasonably be *supposed* to be true; for the reason that the parents or others desiring to obtain a horoscope for the child would, at that time, have had no motive for obtaining such a document save for its advertised utility to the infant in after years, which utility would be defeated unless the astrologer at least started right. Obviously

<sup>1</sup> "Everything (necessary to be done) will be presumed to have been properly done."

quite different considerations arise if the horoscope turns out to have been drawn much later in life. It is, unhappily, well-known in India that horoscopes are frequently drawn for fraudulent purposes. Thus, insurers who are minded to accept them at all in proof of an applicant's age commonly scrutinize them with great care and with the help of some-one having experience in the detection of forged documents.

**The agreed contingency.**—It will be remembered that the essential nature of a contract of insurance is the undertaking to pay a lump sum of money on the happening of an agreed event. Unless and until therefore the contingency agreed upon between the parties shall have occurred, the policy money does not become due and payable to anyone. Accordingly insurers have a right to be satisfied that the event in virtue of which the sum assured becomes payable has, in fact, occurred. A clause in the relative instrument asserting this right is strictly speaking, superfluous, since the essence of the contract is as above stated. However, in both of the policies under review are to be found appropriate stipulations requiring satisfactory proof of the relative event having taken place as a condition precedent to entertaining a claim.

In *John & Ors. v. Oriental Government Security Life Assurance, etc.*, [1929] A.I.R. Mad. 347, it was held, on the construction of the policy in suit, that there must be such proof of death as the insurer's rules require, or "reasonable" proof tendered. In an endowment policy what has to be established is that the life covered has attained to the age agreed upon between the parties. In a combined whole-life and endowment policy either the date of the death or the attainment of the age requisite for the endowment agreed upon must be established, whichever of the two contingencies envisaged is the basis of the claim. In all cases where the fact which has to be proved is one involving the identity of the life the insurer may reasonably insist upon the same kind of proof. On the agreed contingency occurring the policy is said to have "matured".<sup>1</sup>

**Claimant's title.**—It is obvious that an insurer must be astute to see that the person claiming the sum assured is, so far as he can ascertain from the facts, the individual legally entitled to the money. Such a claimant may, in the case of an endowment policy, be the life himself, or a child or servant of the assured or anyone else covered by the doctrine of insurable interest. The claimant may be a nominee, the heir at law, or the transferee of the rights under the policy by a deed of assignment or by endorsement on the policy as permitted by the Insurance Act, 1938. Here, again, there should be at least *prima facie* evidence of the claimant being the person he asserts himself to be, and secondly, evidence to show that he has the rights which he claims. The decision which the insurer has to make, therefore, often involves questions of mixed law and fact. Yet the law does not compel him to turn himself into a court of justice. It does not forbid him to pay to the wrong person. But the law of the land is that he who carelessly pays to a wrong person, does not thereby acquire any defence to the right person's claim if and when the latter comes to be made. It is thus rather in protection of himself that an insurer insists upon evidence from which a reasonable person might be led to believe that it is the rightful claimant with whom he is dealing.

It may sometimes be wise for an insurer to avail himself of the provisions of section 47 of the Insurance Act, 1938,<sup>2</sup> for example, if

<sup>1</sup> The effect of maturity is suspended so long as any condition precedent to paying out remains unfulfilled.

<sup>2</sup> See Appendix I, pp. xxvii, xxviii, *post*.

insurers are honestly in doubt as to the sufficiency of the proof of title tendered to them, or if there be conflicting claims to the money assured, or if, for any other adequate reason, it is impossible otherwise than by paying the money into Court and obtaining the Court's receipt, for the insurer to obtain a satisfactory discharge for payment under the policy. The advantage to be gained by an insurer so positioned is that by sub-section (2) a receipt granted by the Court for the money assured by the policy constitutes a sufficient discharge of his obligations to the rightful claimant, whoever that may be. The provisions of the section are such as to guard against its use save under circumstances of good faith and on adequate grounds. The Court will not entertain an application to make payment into Court under the procedure created by the section until six months shall have elapsed, calculated (in the case of an endowment policy) from the maturing thereof, or (in the case of a whole-life policy) calculated from the date of the receipt of notice as to the dropping of the life insured; nor later than nine months after the policy shall have matured, unless the insurer does not become immediately aware of the policy having matured, in which case the period of nine months is calculated from the date on which the insurer shall have received notice of that fact.<sup>1</sup>

Naturally the insurer is required to transmit to the Court, as and when received, every notice of claim received by him after the date of his application for permission to make use of the procedure alluded to.<sup>2</sup> The Court must then cause notice of the fact that the insurer has paid the sum assured into Court to be served upon every ascertained claimant.<sup>3</sup> Where there is more than one claimant, and some one of the number applies to withdraw the amount so paid into Court, the Court itself must at the last-mentioned claimant's cost give notice of every such application to every other ascertained claimant.<sup>4</sup>

The costs of an application under sub-section (3) for permission to pay the sum assured into Court will be borne in any event by the insurer; but all other costs resulting therefrom are in the discretion of the Court.<sup>5</sup> The insurer's application must be strictly in accordance with the provisions of sub-section (3).

Once the procedure under section 47 has been made available to the insurer by permitting him to pay in the sum assured, the Court must then take upon itself to decide all questions relating to disposal of it.<sup>6</sup>

Monies so paid into Court must, by virtue of sub-section (5), be invested by the Court itself in government securities pending the disposal of any claim. It goes without saying that the interest earned will be added to the capital sum paid in, and that the rightful claimant to the capital will be entitled to the interest thus earned, subject always to the deduction by the Court of any sum which the claimant may be called upon to pay towards costs. The Statutory Rules are silent as to procedure under section 47; but the section itself would seem to provide a sufficient guide. (For "claims to inherit", see pages 449-451, *post*.)

**Privileges.**—The word "privilege", as referring to something to which the assured becomes entitled under the policy, is used in both of the specimen instruments which have been above referred to. In the literature relating to life insurance the word "privilege" and the word "benefit" are sometimes used as interchangeables. It is probably better

<sup>1</sup> Sub-secs. (1) and (4).

<sup>4</sup> *Ibid.*

<sup>2</sup> Sub-sec. (6).

<sup>5</sup> Sub-sec. (6).

<sup>3</sup> Sub-sec. (7).

<sup>6</sup> Sub-sec. (8).

to restrict the word "benefit" to something capable of expression in terms of money, keeping the word "privilege" for some special inducement such as a specified relaxation of a rule or condition which would otherwise operate against the assured and in favour of the insurer. Thus "benefits" under the policy would include, besides the sum assured, any bonus added thereto, and any other method by which the policy-holder might participate in the insurer's profits, as well as the provision under the policy of any money by way of compensation, indemnity or otherwise, consequent upon the assured having sustained disablement as the result of an accident. As examples of "privileges" might be cited clauses specifying "days of grace", convenient methods of reviving lapsed policies, conditions avoiding forfeiture, permission to pay premiums by instalments, and the detail of offers made by insurers the acceptance of which would entitle a policy-holder to obtain a fair monetary consideration for surrendering his policy, or which would enable him to obtain what is called a "paid-up" policy long before, in the natural course of events, it might be expected to mature. This is by no means to exhaust the list of terms which commercial ingenuity has evolved, and to which insurers can rightly point as providing the policy-holder with a "privilege". But the bargains so struck are for the most part rather of commercial than of legal interest, and a discussion of them would be beyond both the scope and the scale of this treatise.

It is sometimes, however, a nice question to determine whether all which a policy-holder imagines he may claim by way of a benefit or privilege is as stable as he might suppose it to be.

The modern insurer is almost always a joint-stock company. Under the law of India, as of England, a company is but another word for a corporation aggregate; and the same may be the creature of a statute, a special charter, or may be self-created, though governed by appropriate special legislation such as in England and in India is commonly referred to as the "companies acts". The powers of a company are derived from and limited by what appears touching its objects in its Memorandum and as the same come to be worked out in its Articles of Association. Many companies take powers to make bye-laws, by which they propose to govern themselves in respect of a particular class or classes of business.

The powers thus taken may often affect the terms of a contract or contracts into which a company has entered. Contracts of insurance are among those which are frequently so affected.

To guard against misunderstanding and resultant disappointment on the part of policy-holders, some insurance companies include in their contracts a stipulation that the provisions of the articles of association should be deemed to be part of the policy. One example of such a stipulation and of its effect in the particular instance must suffice. In 1894 the House of Lords, in *Muirhead v. Forth & North Sea Steamboat Mutual, etc.*, [1894] A.C. 72, had to decide a marine insurance case in which the contract in suit contained such a stipulation. The policy itself contained a condition based upon a particular Article. It had been found, as of fact, that the Article relied on was invalid for want of compliance with certain conditions of the Companies Act. Nonetheless the Court held the condition binding: the *ratio* of the decision being that by the terms of the bargain the conditions were subject to the Articles as they appeared, and the validity of any particular Article concerned not the policy-holders but the shareholders.

Often the working out of a scheme of participation in profits depends upon bye-laws and rules which, by the Articles of Association, an insurance

company may alter from time to time. The question, therefore, arises as to how far, if at all, a contract of life insurance under which a distribution of profit is to be made at certain specified times or in some other way specifically conditioned, can be affected by powers taken under the Articles to alter the relevant rules. This was the question posed in *British Equitable, etc. v. Bailey*, [1906] A.C. 35. In that case the evidence disclosed the powers taken by the company to include that of altering, repealing and suspending any of its bye-laws. It was held that, although the company's bye-laws as existing at the time of the proposal relating to the policy in suit had been advertised, and undoubtedly operated as an inducement to insure with it, the appellant company did not thereby bind itself not to use its powers to vary such bye-laws, and consequently policy-holders must be deemed to have contracted on the basis that such powers were exercisable. In the particular instance the company *had* exercised its said powers, and by virtue thereof, had altered its rules governing the distribution of its profits in the form of bonuses, after the date when the policy in suit had been taken out.

**Special clauses.**—Most policies contain a number of special clauses in the nature of "Exceptions", i.e., they restrict the circumstances under which the policy will be valid; or which—to use other language—exclude death or disablement under certain specified circumstances from the risks assumed. Some of the commoner conditions having the foregoing characteristics will now be briefly considered.

**Travel, residence, occupation.**—Restrictions on any of these heads are rarely found in ordinary policies of life insurance. Some or all of such restrictions are common in many forms of accident insurance; for which reason they will appropriately enough appear in a life policy where the same is so drawn as to include disablement benefits. In most modern policies of life insurance where, by the bargain struck between the parties, there are to be no such restrictions, that fact is expressly stated on the face of the instrument, usually in the Schedule. For example, in the first of the two specimen policies from which quotations have been made earlier in this Chapter there occurs among the printed conditions on the reverse of the instrument a paragraph reading: "*This policy is free from all restrictions as to travel, residence and occupation*"; while in the second of the two policies alluded to, the Schedule has a space referring to "*Conditions as to foreign travel and residence and as to occupation*". The insurer in the last-named instance, where he means to impose no restrictions in the aforesaid regard, customarily completes this part of the Schedule by filling in the words "*world-wide and occupation free*".

**War.**—In the foregoing pages the kind of policies chiefly alluded to have been whole-life or endowment policies or combinations of the two. It may, therefore, be well to remind the student that included in the nature of life insurance business are contracts more limited in scope. The case to which the reader's attention will now be drawn illustrates just such a contract. It also provides an example of a particularly important restriction, of a kind often to be found in policies of life insurance now-a-days.

The case above alluded to is *Coze v. Employers Liability Assurance, etc.*, [1916] 2 K.B. 629. The material facts may be thus summarised.

The assured was a certain Captain E. who in 1905 had taken out a policy of insurance. By it he was insured against death "*caused accidentally within the United Kingdom by violence due to . . . . . external*

and visible means". One of the conditions endorsed upon it read as follows:—

"This policy does not insure against death or disablement, directly or indirectly caused by, arising from, or traceable to any of the following, viz., self-injury or suicide, intoxicating liquors, war, invasion or civil commotion."

The action was brought by Captain E.'s executor to recover the sum assured which, with bonuses, had amounted to £1,450. The matter in controversy between the parties was whether the assured's death was within the exception as to "war".

During the month of May, 1917, the assured was in command of a company of soldiers forming a permanent guard over a certain railway junction in England. This duty involved the posting and the periodical inspection of sentries in and about the station, goods yard, signal boxes, etc. The restrictions imposed on lighting by the Defence of the Realm Regulations then in force had the effect of plunging the vicinity of the station and its approaches by railway in almost total darkness during the hours between sunset and dawn. In order to inspect a particular sentry post the assured had to make his way for a considerable distance by the side of a line of rails. Whilst so walking by the side of the line for the purposes of such inspection the assured was accidentally knocked down by a passing engine or train and killed.

In arguing the case for the plaintiff, counsel contended that such an accident might equally well have happened if there had been a "mobilization" only, and no actual "war". The maxim *causa proxima non remota spectatur* pervaded the whole of insurance law. The war in this instance could not be said to be the *causa proxima*.

Scrutton, J., in giving judgment, observed that the words "caused by" and "arising from" presented no difficulty. They had always been construed as relating to the proximate cause. The words "traceable to" would not necessarily, of themselves, go any further. They were very vague. If they were the only words to be construed, then if the defendants chose to employ such vague words, those words would be construed strictly against them, according to the ordinary maxim. But the words "directly or indirectly" were inconsistent with the other maxim, *proxima non remota causa*, and thus had the effect of taking the contract out of the maxim. Holding also that the facts brought the death if not directly, certainly indirectly, to a state of war as the predisposing cause for the assured being where he was when he was killed, the case fell within the exception and the plaintiff could not recover.

The outbreak of an European war in September, 1939, found India curiously positioned. Strategically she was at once involved. Tactically she could hardly be so unless Russia, Italy or Japan were to enter the arena of conflict against the allies, or were independently to wage war against the British Empire.

A certain flow of volunteers from the Indian peninsula overseas was, however, to be envisaged. So was the passing of a number of persons from civilian life into the auxiliary or other military or naval services in India itself.

Insurance undertakings concerned in life insurance business in India thereupon addressed themselves to designing some form of reasonable cover for persons so positioned, notwithstanding any war Exception appearing in the original instrument. Eventually a number of such undertakings agreed upon a common clause for insertion in life policies,

and the same has been regarded as offering an attractive proposition from the assured's point of view. The clause is thus worded:—

*"Notwithstanding anything herein contained to the contrary it is hereby declared that should the person whose life is assured proceed beyond the limits of India, Burma and Ceylon or become engaged in Military, Naval or Air Force Service he must immediately give intimation to the [Insurer] and make such extra payment as the [Management] may require : failing such intimation and payment if the death of the person whose life is assured shall arise either directly or indirectly from any war (whether war be declared or not) the amount payable under this Policy shall be limited to a sum being either :—*

- (a) *The total amount of premiums (exclusive of extra premiums) paid hereunder less any sums paid by the [Insurer] in respect of Bonuses in Cash, portions of sum assured or of surrender value, or otherwise, or*
- (b) *the surrender value of the Policy whichever shall be the greater, but shall not exceed in any case the sum assured stated herein and attaching Bonuses, if any."*

The student will note the limitation which the ordinary war exception clause imposes upon any other clause which, but for such restriction, might in terms afford a general permission to vary the occupation or place of residence of the assured, and to travel anywhere and anyhow, at will. Naturally the degree to which a war restriction or other like clause so operates is entirely one of construction in every case. The value, however, of a clause such as is set out immediately above, and which expressly extends the insurance to those who may have to pass from civilian life into one or other of the armed forces of the Crown, or who may be obliged to travel abroad under circumstances which will add a risk or risks occasioned by warlike conditions, was all the more to be appreciated by the general public in India.

*Suicide.*—In both the policies quoted already cited as specimens there appears a clause making payment under the policy conditional *inter alia* upon the life not dropping by suicide within a period specified in the clause.

In the first, the relative clause is expressed as a "proviso" and is printed upon the obverse of the instrument. It reads as follows:—

*"PROVIDED ALSO that in case the Life Assured shall, within one year from the date of commencement of this Assurance, commit suicide, whether insane or not at the time, the liability of the [Insurer] shall be limited to the extent of any beneficial interest which any person (other than the Life Assured) shall prove to the satisfaction of the [Insurer] to have been acquired in the Policy bona fide and for valuable consideration, and of which notice in writing shall, at least one Calendar month previous to his death, have been given to the [Insurer] at [his] office in . . . and save and except to that extent this Policy shall be void and all claim to any benefit out of, or interest in, the Funds of the [Insurer] by virtue of these presents shall cease and determine."*

In the other specimen policy drawn upon for illustration the corresponding provision figures as Condition No. 7, and is printed on the reverse of the instrument. It is in the following words:—

*"7. Should the Life Assured die by his (or her) own hands before the Policy has been in existence three years, whatever the circumstances in which the act was committed, the Policy will become void, except to the*

*extent hereinafter provided, viz.:—It will be available to indemnify any person or persons (other than the Life Assured) who has or have an interest in the Policy acquired for a sufficient pecuniary consideration against any loss in connection with such interest occasioned by the death of the Life Assured in manner aforesaid: provided that where such interest has been acquired by assignment or charge of the Policy notice thereof in writing shall have been received by the [Insurer] prior to the date of death."*

The terms of the two foregoing clauses, when contrasted, exhibit the following amongst other differences:—

In the first-named clause the important words are "*commits suicide whether insane or not*". In the other the words are "*die by his (or her) own hands . . . . . whatever (may be) the circumstances in which the act was committed*".

By the one instrument the benefits are not completely secured till three years shall have passed; in the other they are safe after the expiry of one year. Each instrument, save to the extent indicated in the relative clause, creates a term of the contract whereby the policy becomes void.

In England the word "suicide" is a term of art, and imports not only that the person dies in consequence of some self-inflicted injury, but that the intention behind that injury was to bring about death. Thus, so far as a contract attracting the law of England be concerned, a clause in which the act which may avoid the contract is described as "suicide", will be strictly construed against the insurer. Consequently nothing less than suicide, in its technical sense, will do. So if a man were to die as a result of a self-inflicted injury, but without the intention of thereby bringing his life to an end, the policy could not be avoided on the ground of *suicide*, no matter when or how the act relied upon occurred.

In the clause in which the word "*suicide*" appears the words "*insane or not*" also appear. Thus under that particular clause the condition of the mind at the time of committing the suicide is quite immaterial.

Adverting to the second policy, the words there used are seen to be much wider; and even when given a meaning (as they must be) the most favourable to the assured, they plainly include a death following upon any self-inflicted injury, however unintentional. In fact the clause seems to have been drawn with an eye to avoiding certain decisions in America, wherein the words "*death by his own hand whether voluntary or involuntary*" have been regarded as having much the same meaning as "*suicide sane or insane*", a construction which, according to the American view, would not prevent the recovery of the policy monies in a case of purely accidental death attributable to the life's own act. (*Keels v. Mutual Reserve, etc.*, [1886] 29 Fed. Rep. 198; *Home Benefit v. Sergeant*, [1891] 124 U.S. 691.)

But there must be some language to which an insurer can resort in order to differentiate between (a) an intentional killing of himself by a sane man and (b) intentional killing of himself by an insane man and (c) an accidental killing of himself by a man whether sane or insane. Likewise, if words can be used (as they surely can) to distinguish the foregoing wholly different facts, some general clause must also be frameable whereby all the foregoing circumstances are brought within one general notion. It is respectfully submitted that the words quoted from the last-named specimen policy have that effect.

In a recent case in England the plea was allowed to be raised that *any* suicide clause, no matter how worded, was void at Common Law,

and therefore that (with certain qualifications), no one claiming under it, no matter when the death occurred, could recover under the policy. A similar plea was raised in two Indian cases, with quite a different result. Some account of these three cases would seem to be necessary; and as an aid to understanding the respective *rationes decidendi* the student may be glad to be reminded of certain matters of history.

By the Common Law of England the intentional taking of human life has for centuries been, and still is, regarded as an heinous crime, unless such killing be done in due course of law or under the protection of the law. The taking of human life under circumstances unprotected by the law of the land was and is a "felony", and the person who carries out the deliberate and unprotected killing is styled a "felon".<sup>1</sup> One who intentionally takes his own life commits a felony against himself, and accordingly becomes a felon in respect of the crime so committed upon himself.<sup>2</sup> In earlier days to be convicted of a felony carried with it disabilities which have since been removed by statute.<sup>3</sup> But by the time of Hawkins it was already well-settled that the disabilities under which the murderer of another and certain of his relations formerly laboured, were neither so many nor so far-reaching in the case of suicides. For example, forfeiture in the case of suicides did not extend to lands of inheritance, nor was the felon's blood corrupted, nor was his wife barred of her dower. (Hawkins' "Pleas of the Crown", Bk. I, Chapter IX, Sec. 8.) In the law of England the most heinous form of killing went, and still goes, by the name of Murder. That suicide was always regarded as murder is sufficiently plain from the words of the old inquisition whereby it was stated of the dead man that he *felonice et voluntarie se ipsum interfecit et murravit*.<sup>4</sup> (Hale's "Pleas of the Crown", Chapter 31, p. 412.) Although after 1870 forfeiture no longer was allowed as part of the penalty for felony, that fact left untouched the doctrine that the criminal must be prevented from obtaining any benefit from the commission of the crime. In actions on contract, the Courts would not enforce anything which would result in any such benefit to him or his estate; thus applying the *maxim ex turpi causa non oritur actio*.<sup>5</sup> "It appears to me" said Fry, L.J., in *Cleaver v. Mutual Reserve Fund Life Assoc.*, [1892] 1 Q.B. 147 at 166, "that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour." Now, so early as 1830, Lord Lyndhurst, C., had refused to allow the assignees of a bankrupt who had been convicted of forgery to recover the proceeds of a life insurance taken out by the forger,<sup>6</sup> and in *Horn v. Anglo-Australian and Universal Family*

<sup>1</sup> Readers of Chapters IV, V and VI of this treatise will have come across other examples of "felony" at Common Law or by statute; and will have noticed also that lesser crimes are known in the law of England as "misdemeanours". The Indian Penal Code makes no such distinction; nor does the word "felony" find any place in the statute. What are known as "crimes" in the law of England are throughout the Indian Criminal Codes referred to as "offences".

<sup>2</sup> Hence the words *felo de se*, an expression with which students of the English law of crime will have long been familiar. (*Felo* is the felon; *felonia* the class of crime.)

<sup>3</sup> By the Forfeiture Act, 1870. Forfeiture is no part of the penalties incidental to any class of offence under the Indian Penal Code.

<sup>4</sup> "Feloniously and intentionally killed and murdered himself."

<sup>5</sup> "Out of a shameful cause [or matter] an action [at law] cannot arise."

<sup>6</sup> *Amicable Society, etc. v. Bolland* (commonly called "*Foundery's Case*"), [1830] 4 Bligh, N.S. 194.

*Life Ass., etc.*, [1861] 30 L.J. Ch. 511, Wood, V.C., after referring to Lord Lyndhurst's reasoning, said, "So the argument might be pursued—although I do not know that any case has so decided—to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony and losing his life thereby . . ."

With the foregoing sketch of the historical background before him, the reader may now find it easier to appreciate the nature of the controversies which had to be dealt with in the three recent cases alluded to earlier in the present section. The first of these arose out of the suicide of a certain Major R. The claim was made against Major R.'s insurers by his administratrix. (*Beresford v. The Royal Insurance Co.*, [1936] 155 L.T. 210.) Swift, J., gave judgment for the plaintiff. On appeal the Court (Lord Wright, M.R., Romer and Scott, L.J.J.) reversed that judgment holding (a) that suicide being a felony, it was contrary to public policy that the suicide's administratrix should recover on the latter's policy on the happening of the suicidal event, (b) that the administratrix was affected by all the defences which would have been available against the assured himself or his assignee. Lord Wright, M.R., commenting upon the fact that the point had never expressly arisen before in any reported case, drew attention to the notorious fact that Coroners' juries were reluctant to bring in a verdict of *felo de se*, preferring to find that the deceased had committed suicide while of unsound mind. In Major R.'s case it proved impossible for the members of the jury<sup>1</sup> to come to any other conclusion than they had done. In answer to certain specific questions left to them by the judge, they found Major R. not insane, but that when he shot himself he was possessed of that degree of physical, intellectual and moral control over his actions which a normal man would have.

The undisputed facts upon which the foregoing verdict depended were that the aggregate sum secured by the policies (taken out some years earlier) stood, on the material date, at £50,000. Until the last premiums fell due Major R. had somehow managed to keep them up, partly by borrowing from the insurers themselves against the relative surrender values. On the 16th of July, 1934, some £400 still remained due. Days of grace, however, had been gratuitously extended up to 3 p.m. on the 3rd of August. The assured's debts had, however, amounted to more than £60,000; he had no assets, and was at the end of his credit. Some few minutes before 3 p.m. on the last-mentioned date he shot himself in a cab. The act was premeditated, in the sense that the assured had determined upon it, should he fail to raise the necessary monies during that day and before the policies lapsed; for he had left with his solicitors a letter in which he showed himself as realising that what he was about to do would amount to a technical fraud on the insurers; but he felt that what they would pay out, less the loans, would be a relatively small loss compared to what would be sustained by his other creditors who had lent him money on the strength of those policies, if the same were to lapse. The judgment of the Court of Appeal is reported in [1938] 8 Comp. Cas. 64.

The plaintiff then carried the case to the House of Lords ([1939] 9 Comp. Cas. (Pt. III) 1), where the matter was argued before Lords Atkin, Thankerton, Russell of Killowen and Macmillan. The House upheld the decision of the Court of Appeal. The effect of the decision

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<sup>1</sup> The jury here referred to was not the Coroner's jury, but the Special Jury which sat with Swift, J., to try the civil action on the policy.

is thus correctly summarised in the head-note of the report cited:— (1) There was no doubt that the insurance company promised the assured that if he, when in full possession of his senses, should intentionally kill himself during any period after the first year, they would pay the sum assured. (2) Such a contract was unenforceable in a Court of Law: the absolute rule being that the Courts would not recognise a benefit accruing to a criminal from his crime, and deliberate suicide had always been regarded in English law as a crime. As during the assured's life he had power of complete testamentary disposition over the proceeds of the policies on his death, and the agreement for the assurance having been made by the assured for the express purpose of benefiting his estate after his death, the principle applied, and there was no right in his personal representative to recover any benefit which only took shape on his death. Lord Atkin added "I consider myself free to say that I cannot see that there is any objection to an assignee for value before the suicide enforcing a policy which contains an express promise to pay upon *sane* suicide, at any rate, so far as the payment is to extend to the actual interest of the assignee". Lord Macmillan preferred to reserve his opinion "as to the position of third parties who have *bona fide* acquired rights for value under such policies".

In 1936 the High Court at Lahore had before them the case of *Co-operative Assurance, etc. v. Sach Dev & Anr.* (6 Comp. Cas. 211). The policy in suit had upon it, in the form of a foot-note, a notice that the policy was granted subject to the company's rules and regulations for the time being in force. It was contended, and so held, that this entitled the company to have read into the policy the company's regulations in force when the life dropped. The material rule so attracted provided that, if the assured committed suicide within two years of the issue of the policy, the sum payable would be the aggregate sum of the premiums by then paid and no more; but that if suicide was committed after the two years, there would be no forfeiture in any respect. The assured had taken out an endowment policy which was issued to him on the 22nd of December, 1919. The policy was expressed as for the benefit of himself or, in the case of his death earlier than the matured date for the endowment, for that of his heirs or assigns. The assured, in the language of the judgment of the High Court, "put an end to his life by his own act". In both the lower Courts the company had been only concerned to argue the question whether the rules in force when the policy was taken out, or those in force when the policy matured, were to be incorporated in the contract. Under the first set of rules suicide at any time would disentitle the heirs or assigns to receive anything more than the premiums paid. Under the later rules the heirs (his two minor sons, suing through their mother as next friend) would receive the whole of the policy monies, because the suicide did not take place till after the expiry of two years mentioned in the relevant rule. In neither of the Courts below, therefore, was any contention raised as to the validity of a contract of life insurance in such terms.

But before the High Court, in Second Appeal, the contention was expressly raised that the contract was void and inoperative as being opposed to public policy. The bench (Tekchand and Jai Lal, JJ.) however, declined to entertain the plea at such a stage in the litigation, grounding their refusal upon the fact that there was no finding (in consequence of the plea never having been taken in the original Court) as to whether the assured when he committed the act of suicide was of sound or of unsound mind.

In 1938 the validity of such a term of a contract of life insurance expressly arose for determination by another bench of the same High Court in India. (*Northern India Insurance Co. v. Kanhayalal*, [1938] Lah. 542.) The policy sued upon was taken out on the 1st of June, 1932. It contained a condition to the effect that in the event of the person whose life was assured dying by his own hand before the policy had been in existence for one year the policy would be void and all premiums forfeited. In November of 1932 the assured assigned the policy in favour of his son, who was the plaintiff in the suit, and ten months later committed suicide in an hotel at Lahore. The insurers had taken various defences upon which nothing turns germane to the subject under discussion. In appeal to the High Court, however, the contention was definitely raised that the descendants of the assured could not be allowed to benefit as a result of the crime committed by their father; and the decision of the Court of Appeal in England in the case of *Beresford v. The Royal Insurance Co.*, [1936] 155 L.J. 210, was relied upon.

In a remarkably short judgment their Lordships (Addison and Abdul Rashid, JJ.) disposed of this contention as follows: "In India," they said, "the committing of suicide is not a crime. Attempted suicide is punishable under section 309, Indian Penal Code, while abetment of suicide is punishable under section 306. The committing of suicide in itself is not and cannot be regarded as a crime in India. In this respect the English Common Law is inapplicable to India, as the criminal law of India is the creation of statute." The appeal was accordingly dismissed and the decree for Rs. 4,905 upheld.

While the statement that the criminal law of India is the creation of statute is one which cannot be disputed, it is respectfully submitted that to hold suicide to be no offence under the statute is to fall into error. Unhappily the judgment does not indicate by what chain of reasoning their Lordships arrived at such a conclusion.

In the first place it is to be observed that the Indian Penal Code treats of all killings under the two broad categories of homicides which are culpable and homicides which are not.<sup>1</sup> Culpable homicide is defined in section 299. That section is in terms as follows:—

*"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

If language means anything, the man who kills himself with the intention of so doing is within the definition of one who commits the "offence" of culpable homicide.<sup>2</sup> As the reader has already been reminded, what in English law is called a "crime", is under the Indian Penal Code styled an "offence".

Passing to the next section in the same Code we reach the definition of murder which is thus set forth:—

*"Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, . . . ."*

<sup>1</sup> The word homicide means "man-killing".

<sup>2</sup> The student is to be guarded against supposing that because the self-killer cannot be caught and punished what he does is no crime. The test of an offence is the nature of the act, not the ability to catch and punish the criminal. The dishonest taking of a watch is not rendered innocent because the thief has escaped and cannot be found.

The act of self-killing is not included in the statutory exceptions. It is therefore submitted that under the law of India suicide is self-committed culpable homicide, and, secondly, is that form of culpable homicide which may be correctly described as self-murder. This being the way in which the draftsmen of the Indian Penal Code dealt with the whole question of man-slaying, there was no need to introduce a special definition of suicide *eo nomine*. But, as their lordships of the Lahore High Court themselves observed, the word "suicide" does actually occur elsewhere in the Code. They mentioned two sections. In fact there are three. But what their Lordships would seem to have missed is the full import of the specific offence created by section 309, and of the use of the word "offence" in that section. The section reads:—

"Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with etc. . . ."

The maximum sentence prescribed by the section is expressive of mercy, since it is one year's imprisonment or a fine or both. In the case of any other form of attempt to commit a culpable homicide the maximum penalty is seven years' imprisonment or a fine or both: the penal section in that regard being section 308.

Again, as it is submitted, their lordships have failed to appreciate the significance of sections 305 and 306, which both deal with "abetment" of suicide *eo nomine*. It is noticeable, indeed, that there is a chapter of the Indian Penal Code dealing generally with abetments; and that in the definitive section the words used would, if literally construed, cover instigation or aid of the doing of a "thing", not necessarily in itself a wrong, in the sense of an offence under the Code. But this definition has been considered unfortunately worded, and that the abetment of an act not in itself an offence is not intended to be aimed at by the Code.

What is submitted to be significant is that the abetment of suicide is itself made a specific offence; that the offence thus created is not dealt with in the chapter dealing generally with abetments, but that the relative section is placed amongst that group of sections, namely 299-309, exclusively concerned with the offence of homicide in one form or another, with the attempt to commit the same, or to abet it in any way; and, lastly, that the abetment of a suicide committed by an adult not under disability is made punishable with rigorous imprisonment which may extend to as much as ten years; while the abetment of a suicide committed by an infant, a lunatic, an idiot or a man drunken, may be punished with death or transportation for life.

Looking, then, at the law of India in respect of homicides as expressed in sections 299-309 of the Indian Penal Code, which sections include the offences of attempted suicide *eo nomine* and abetments of the same, one discerns a striking reflection of the view of the Common Law of England upon the same subject, as that law is succinctly stated in Stephen's celebrated digest. "A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder, and every person who aids and abets any person in so killing himself is an accessory before the fact or a principal in the second degree in such murder".<sup>1</sup> Hence, as Lord Wright said in the *Beresford* case, when delivering the judgment of the Court of Appeal, "where there has been what is called a suicide pact between two persons and one survives, the survivor is guilty of murder". The effect of such a pact under the

<sup>1</sup> Stephen, Digest of the Criminal Law, 7th Ed., Article 319.

law of crime in India would not, in theory, be substantially different. The survivor would, it is submitted, have committed the offence of abetment of suicide, i.e., that of self-murder either by instigating or giving aid to the person who has committed the self-murder, and would in consequence expose himself to a penalty which in a particular set of circumstances, may, as in England, be the maximum for any person so guilty of a "constructive" murder, namely death.

For the foregoing reasons it is submitted that a contract of life insurance which embodies an agreement to pay money to the assured's estate where the life should drop by an act of suicide committed in a sane condition, is void in India as in England as being opposed to public policy<sup>1</sup> within the meaning of that expression as used in the Indian Contract Act.

It is submitted that an agreement which involved payment under a policy of life insurance where the life had dropped by an act of suicide while of unsound mind, would not be void by the law of contract in India. The criminal courts in this country have, on a plea of insanity being raised on behalf of an accused person, followed what in England is known as the rule in *Macnaughton's* case as the test of irresponsibility. But there would seem to be no reason, on principle, why that should be the test of insanity for any purpose connected with a civil contract. The rule is regarded by most thinking people to-day as quite out of harmony with modern knowledge and modern scientific opinion concerning what constitutes criminal responsibility.

**Days of grace—forfeiture.**—The provision of so-called "days of grace" arose fairly early in the history of insurance business, from a desire not in certain circumstances to take an unfair advantage of an assured, by exacting the forfeiture which the policy imposed for breach of the condition as to punctual payment of premiums. If punctual payment be made a condition precedent to any liability on the part of the insurer, the stipulation goes to the root of the contract, and breach of the condition disentitles the party in default from calling upon the other to fulfil any obligation. As was said in *Frank v. Sun Life, etc., of Canada*, [1893] Out. A.R. 564, "promptness of payment is of the very essence of the business of life insurance, and if therefore any one of the quarterly instalments remains unpaid, the forfeiture is absolute, unless there is something in the contract itself to dispense with it. When no such stipulations exist it is the well established understanding that time is material, or, as it is sometimes expressed, is of the essence of the contract."

It may be well to point out here that *quarterly premiums* and *annual premiums* are two very different things, and not the less so that, for the convenience of the assured, the insurer may agree to take an annual premium by quarterly instalments. For the right to the annual premium (however payable) arises at the commencement of each year succeeding that in which the contract was effected. Where, for the assured's convenience, payments by instalments are permitted, the punctual payment of each instalment is a condition precedent to the insurer's liability. (*Phoenix Assurance, etc. v. Sheridan*, [1860] 8 H.L.C. 745.)

The emergence of a recognised usage as to days of grace did not however immediately remove the full effect of the fundamental

<sup>1</sup> It may not be inapposite to observe that suicide is fundamentally opposed to the Hindu Law, the Mohammedan Law and the Canonical Law of the Christian Churches. It is, under each of these religious systems, regarded as a deadly sin.

stipulation as to payment of premium by the due date being a condition precedent. The question which came to be agitated was whether, if the life dropped after the stipulated date for payment had passed, yet before the expiry of the days of grace, anything could be recovered under the policy where the assured had died without paying the premium. The answer was seen to depend upon whether a contract of life insurance is—like one of marine or fire insurance—a contract from year to year with a mere option to renew on prescribed terms, including a specified time. If that were the true nature of the contract, it would, under the circumstances posed, have determined by efflux of time, and the only effect of the days of grace would be to offer the assured an opportunity to renew by making a payment within 30 days calculated from the date when the policy lapsed. Naturally, if he failed to seize upon that opportunity before he died, he would leave his successors in interest with nothing to sue upon. On the other hand, if a contract of life insurance stand on a different footing, and be not one from year to year, but is intended by the parties to subsist during the remainder of the life insured, or till the attainment by the latter of a certain age, the introduction or attraction of days of grace would merely have the effect of extending the time within which payment of premium would be deemed punctual, by whatever number of days the custom or the relative clause permits. In that view of the matter, the mere fact of the life dropping before the final date indicated by the last grace-day would involve no forfeiture, and the insurer would be under a liability to pay the policy money, though he might liquidate his cross-demand for the current premium by deducting the amount of it from the total due under the policy, and paying over the balance.

From what was said in *Pritchard v. The Merchants Life, etc.*, [1858] 3 C.B. (N.S.) 622, 643, in *Phoenix, etc. v. Sheridan, supra*, and by Collins, M.R., in *Stewart v. Freeman*, [1903] 1 K.B. 47, a policy of life insurance is to be regarded as “a contract for a year with a provision for renewal which would entitle the insured to insure in a future year at the same premium . . . provided he approached the insurer within a certain time”—in other words, a yearly contract with an irrevocable option<sup>1</sup> to renew, if exercised in time.

The Supreme Court of the United States has found itself unable to adopt such a view of the contract. In *New York, etc. v. Statham*, [1876] 93 U.S. 24, the view was definitely held as “untenable” because, as said one of the judges, “the value of insurance for one year of a man’s life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of insurance for the year in which it is made.” There is surely much to be said for this view. It is the fact that insurers do not, in any commercial sense at all, work out the premium on the basis of arriving at some figure which, according to the tables of mortality, will represent a fair consideration for a risk to extend only over the next twelve months; and in such a state of facts can it be said that the parties mean nothing more than to enter into a twelve months’ contract? Are not the circumstances somewhat analogous to those which take shape in a lease for a term of years, with a covenant to pay an annual rent?

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<sup>1</sup> The word “option” was used by Lord Ellenborough in *Salvin v. James*, [1805] 6 East 571, 582.

Both views were argued before the Court of Appeal in Ontario in *Manufacturers Life, etc. v. Gordon*, [1893] 20 Ont. A.R. 309. The bench of four judges, unfortunately, was equally divided.

Before calling attention to certain Indian decisions, it may be noted that modern insurers have in this, as in so many other directions, tended more and more towards really fair dealing with their clients. In the two policies used in illustration of the foregoing discussion the non-forfeiture conditions and days of grace "privileges" are as set out below. The relevant clauses as to days of grace are as follows. They have the same intention and effect.

"POLICY No. 1.

*Days of Grace.*—30 days of grace are allowed for payment of yearly, half-yearly or quarterly premiums, and 15 days for monthly premiums. If death occurs within that period and before payment of the premium then due, the Policy will still be valid, and the sum assured paid after deduction of the current year's premium."

"POLICY No. 2.

*Days of Grace.*—Premiums or Instalments of Premium must be paid within thirty days after the date on which they fall due, otherwise the Policy will become void except as hereinafter provided. In the event of the death of the Life Assured within such thirty days and before payment of the Premium or Instalment, the amount due under the Policy will be payable after deduction of the unpaid Premium or Instalment."

The reader may now compare the provisions in respect of non-forfeiture, which read as under:—

"POLICY No. 1.

*Non-Forfeiture Regulations.*—If after at least two full years' premiums have been paid in respect of this Policy any subsequent premium be not duly paid, this Policy shall not be wholly void, but the sum assured by it shall be reduced to such a sum as shall bear the same ratio to the full sum assured as the number of premiums actually paid shall bear to the total number originally stipulated for in the policy, provided such reduced sum be not less than Rs.150. The Policy so reduced shall thereafter be free from all liability for payment of the within-mentioned premium but shall not be entitled to participate in future profits. If the policy be on the With-Profit Scale the existing vested Bonus Additions (if any) will remain attached to the reduced Paid-up Policy.

*N.B.*—Notwithstanding what is stated above if, after at least three full years' premiums have been paid in respect of this Policy, any subsequent premium be not duly paid in the event of the death of the life assured within six calendar months of the due date of the first unpaid premium the policy moneys will be paid as if the policy had remained in full force under deduction of the premium or premiums unpaid with interest thereon to date of death on the same terms as for revival of the Policy during such period."

"POLICY No. 2.

*Non-Forfeiture.*—A policy which has a net Surrender Value sufficient at least to pay one year's Premium will not lapse by non-payment of the

*Premium or Instalment thereof within the days of grace, but the net Surrender Value will be applied in keeping the Assurance in full force for so long a term as such Surrender Value will cover, provided application has not been made within the days of grace for a Paid-up policy. The amount of the Premium or Premiums so provided, together with Compound Interest thereon at the rate of eight per cent per annum, will be a first charge on the Policy."*

In *T. G. Rajan v. Asiatic Government Security Life, etc.*, [1938] Comp. Cas. (Ins.) 138; [1938] 2 M.L.J. 1020, the point for consideration was whether the original due date was to be excluded in computing the period of grace. The material facts were that by the terms of the contract the premium was to be paid quarterly on the 3rd day of July, October, January and April. By a condition endorsed on the back of the policy thirty days of grace were allowed. Premium payable on the 3rd of July, 1933, was not paid till the 2nd of August of that year. In a suit on the policy, the insurers contended, *inter alia*, that the days of grace had expired on the 1st of August and the policy had consequently lapsed. In giving judgment Venkataramana Rao, J., said "it is a settled rule of construction that provisions relating to forfeiture should be construed in favour of the assured and against the company. There is also the well-recognised principle that where computation is for the benefit of the person affected as much time should be given as the language admits of, and where it is to his detriment the language should be construed as strictly as possible." Applying the foregoing rules it was held that the days of grace ran from the next day after the due date and that therefore the payment made on the 2nd of August was within time.

Some years earlier, in *P. Sankunni Menon v. Empire of India Life Assurance, etc.*, [1931] 1 Comp. Cas. 402; 61 M.L.J. 388, the same learned Judge declined to entertain the contention that a stipulation requiring any claim to a paid-up policy or a surrender value to be made within twelve months is really a stipulation for forfeiture in the nature of a penalty and should be relieved against.

A clause similar to the non-forfeiture clause quoted from Policy No. 2, above, fell to be considered in *National Indian Life Insurance Co. v. Mahadevan & Anr.*, [1933] 3 Comp. Cas. 184. The short point in the case was: what is the true construction and effect of the words "*sufficient to pay at least one year's premium*". The material year ran from the 2nd of April, 1920 to 1st April, 1921. The annual premium under the policy was Rs. 150-12 payable in four quarterly instalments, three of which, amounting in all to Rs. 113-1, had been duly paid. But default was made in payment of the last instalment which amounted to Rs. 37-11. In a suit on the policy the insurers pleaded an out-and-out forfeiture. The Court found, as of fact, that on the date of default the surrender value of the policy was admittedly Rs. 86. The balance due against the annual premium was Rs. 37-11. The learned judge asked himself a question: was the surrender value sufficient or not to pay the year's premium? In the second place he asked himself: what was the year's premium? He then proceeded "In considering whether the surrender value was sufficient to pay the year's premium or not, we cannot overlook that a portion of the year's premium had already been paid. To ignore this circumstance would be not only unreasonable but opposed to the clear intention of the parties." Holding that under the relative clause the surrender value was to be treated as money belonging to the assured, and to be applied to paying the annual premium if there was enough for that purpose, the learned judge arrived at the conclusion that with Rs. 86 odd available to meet the instalment of Rs. 37 equity

would not allow the policy to be treated as forfeited. No doubt such reasoning harmonizes with the notions of justice, equity and good conscience with which, as it is said, the courts in India should be astute to see that their decisions are always informed. But it involves construing the words "sufficient to pay at least one year's premium" as if the phrase read "sufficient to make up any outstanding balance due on one year's premium". It has to be remembered that such a construction is not rendered easier by the fact that "one year's premium" means the whole of a year's premium in the ordinary acceptance of the term, and that, in the particular instance, what was due was not a quarterly premium but an instalment of an annual premium. However, the Court held that this construction was what the parties intended, and it is at least a reasonable construction. Section 113 of the Insurance Act, 1938, imposes a restraint on forfeiture, creating a statutory surrender-value to the extent shewn. (See p. li, *post*.)

**Indisputability.**—The development of insurance business has been marked by many instances of far-sighted ideas aiming at increasing the inducements to honest people to provide for the future through the medium of insurance. Prominent among such ideas is that which has expressed itself in what is known today as an "indisputability" or (as it is sometimes called) an "incontestability" clause, as one of the terms of a policy of life insurance. Many policies contain no such clause. But there is no doubt that, where circumstances point to the proposer being absolutely honest, the inclusion of such a clause in the policy offered to him is thoroughly good business.

It may be said that today there is general agreement amongst insurers that a period of two years should elapse after the issue of the policy before an indisputability clause should take effect. It is, after all, a great privilege to a policy-holder. For it means that, within such limitations as the phraseology of the clause imports, the policy-holder is freed from the danger of the claim being disputed upon many grounds commonly taken as defences to an action on the contract. Indisputability clauses take many forms. But all of them are so phrased as to reserve the right to the insurer to contest the claim on the ground of fraud. And nobody has suggested, or could suggest, that such a reservation is unreasonable.

In *Oriental Government Security Life, etc. v. S. C. Chatterjee*, [1895] 20 Bom. 99, the High Court at Bombay had before it an action to enforce a policy which the Court held to have attracted the insurer's prospectus. In the latter document there was a statement to the effect that policies held by parties on their own lives were indisputable on any ground whatever except fraud. The same prospectus contained a provision making it incumbent on a policy-holder to establish the age of the life insured to the satisfaction of the insurer as a condition precedent to any liability to pay on the policy. The insurers in the suit contended that no such satisfactory proof of age had been adduced. On the facts the Bench was of a different opinion. They held, however, that as full an effect should be given to such a statement in the prospectus as in the instance before them promised indisputability, as if that promise had appeared in the form of a condition appearing on the face of the instrument. The effect of the condition in the case before them their lordships held to be this: that if a misstatement had been made as to the life's age at the material time, and such misstatement were shown to be fraudulent, a plea based on fraud in avoidance of the policy having been

expressly reserved to the insurers, would be an answer still open to them; but if the misstatement as to that matter, or any other material matter, should have been made otherwise than fraudulently, it would afford no ground for disputing the contract. This was to apply the principle which the Court of Appeal in England had laid down in *Anstey v. British Natural Premium, etc.*, [1908] 99 L.T. 16. In the policy there sued upon appeared the condition that it should be "*indisputable from any cause (except fraud) after it shall have been continuously in force for two years*". It had in fact been in force for over two years when the claim was made. Fraud was not proved; but an inaccurate answer, involving a non-disclosure of a subordinate occupation, was relied upon as amounting to misrepresentation vitiating the policy. The Court of Appeal held that the clause must mean that after the lapse of two years neither misrepresentation nor breach of warranty could be relied upon as a defence in the absence of fraud, and none was there established. To construe the condition otherwise would be to make nonsense of it.

In the first of the policies used for purposes of illustration in the present Chapter an indisputability clause is included among the so-called "privileges" offered to the policy-holder. It is thus worded:—

*"Indisputability of Policies.—Notwithstanding what is within stated, after the Policy has been in force for two years and provided the age has been admitted, it is, except on the grounds of Fraud, indisputable in connection with any statement made or referred to in the Proposal."*

**Statutory restraint on disputability.**—It will be at once observed that what is offered here is a much more limited promise than that which figured in either of the cases above alluded to. It conveys a sensible promise, and one which, as a matter of fact, since the enactment of the Insurance Act, 1938, every holder of a life-policy issued by an insurer to whom the last-named statute applies will henceforward enjoy by virtue of the Act itself. Consequently a condition worded as is the last condition quoted becomes, technically speaking, henceforward superfluous. It will probably, however, strike Indian insurance undertakings as only fair that the policy should contain a notice indicative of the limitations imposed by the Act upon an insurer's rights to dispute the claim.

The limitations alluded to above refer exclusively to life insurance. They are created by section 45 of the statute. That section reads as follows:—

*"Policy not to be called in question on ground of misstatement after two years.—No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter and fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false."*

A statute which cuts down or limits the rights of parties under a class of contract as to which the law has been long settled is always construed strictly. If the language of section 45 be examined, it will be seen to limit the ordinary rights of insurers to the following

extent only. A period of limitation is created within which a policy of life insurance may be avoided on the usual grounds of one or more mere misstatements binding on the assured and appearing either in the proposal itself, in the report of the medical examiner, or of a referee or a friend, or in any other document leading to the issue of the policy. That period of limitation is two years, calculated, in the case of a policy effected before the Act, from the 1st of July, 1939; and in the case of all other policies, from the date of the contract. The insurer's rights in the case of a material misstatement made fraudulently by the policy-holder remain unaltered. It is otherwise if the policy-holder be not the life covered. The section has no application to any condition which is "precedent" to recovery under the policy, *e.g.*, satisfactory proof of the assured's age, or the title of any claimant to policy-moneys.<sup>1</sup>

There are two ways in which, within the period of limitation, the insurers may avoid the policy on any of the usual grounds. These are (a) when the claim is made within that period and (b) though no claim be made, where the insurers discover the breach of warranty or other misstatement before the period prescribed by section 45 has run out. In such a case, if so minded, the insurers may sue to have the contract set aside.

**Other such clauses.**—It is now necessary to say something of indisputability clauses which purport to promise more than either the clause quoted from one of the policies used in illustration of this Chapter offers, or than what the provisions of section 45 of the Insurance Act, 1938, dictate.

Examples of such clauses appear in the two cases cited above. Each of them in effect purports to promise that the policy will not be contested, after the period named, upon any ground whatever save that of fraud. It is therefore necessary to point out that every such clause may on contest prove a sad disappointment to the policy-holder in a certain set of circumstances. The student will already have learnt from what has been said earlier in the present treatise, that parties to a contract cannot by any kind of private arrangement render legal that which is illegal, in the sense of contrary to law. A promise not to take a plea that a contract is illegal, when in fact it is so, is one which no Court would enforce. To do so would be to uphold an illegal contract, and that is something which no Court of Justice has any jurisdiction to do. Thus a contract involving traffic with an alien enemy as the same may be found forbidden by some law in force for the time being and to which the parties are subject, or which is void at law as being merely wagerous, or in respect of which the policy-holder had at the material time no insurable interest, or which for any other reason is opposed to public policy, could always be avoided by appropriate pleas despite the presence on the face of the policy of an indisputability clause, however framed.

But it is submitted that a clause promising indisputability in such wide language as do those examples to which allusion is here made, would preclude an insurer from raising a defence under the law of limitation.

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<sup>1</sup> Naturally, a prior admission by the insurers of the age or title asserted would preclude the insurers from reliance upon any subsequent discovery of error, unless fraudulent conduct could be alleged as accounting for it. But this is so, not because of anything enacted in sec. 45, but on the well-settled principle of *estoppel*.

In like manner he could not, it is submitted, raise any defence grounded in an alleged "mistake", however good such a ground might be, if he had not expressly undertaken not to resist the claim save upon some ground of fraud.

**Waiver.**—Readers of earlier Chapters of the present treatise will have noted what has elsewhere been said upon the subject of waiver. Briefly stated, a party to a contract has under the law of India an option, wherever a contract is voidable, either to treat the contract as not binding upon him or to affirm it. It is for him to choose the course he will pursue. It is elementary that no party to a contract, as lawyers say, can both "approbate" and "reprobate" it in the same breath. When, therefore, a contract of insurance is seen to contain a warranty, or any other condition express or implied, the breach of which would entitle one party to it to repudiate the bargain; and when a party on discovery of such a breach is seen not to repudiate it, he is said in lawyers' language to have "waived" the breach. The result of waiver is that from that moment onwards the party who has thus waived the effect of a stipulation in his favour can no longer rely upon that breach to defeat the other party's claim under the contract. Thus, if in an action on a policy an insurer resists the claim on the ground of a breach of warranty or of any other condition—not by any means excluding fraud—and it be established by the assured that for some reasonable period prior to the claim the insurer was aware of the matter or matters since complained of, the insurer will be taken to have waived any right founded upon the matter of complaint. For a waiver may be either expressed or may be implied by conduct. In the case posed, unless there was documentary evidence expressive of waiver, the same would be an example of waiver by implication.

It has been held by the American Courts that the delivery of a policy without exacting prepayment of premium raises the presumption that a credit is intended, and is a waiver of the condition of prepayment. The waiver may also be inferred from any circumstances fairly showing that the insurer did not intend to insist upon prepayment of the premium as a condition precedent. This doctrine was accepted by Sale, J., in a Calcutta case. (*In re An agreement between the Universal Life Assurance Society and M. C. Sterndale*, [1896] 23 Cal. 320.)

Since the doctrine of waiver depends entirely upon knowledge—for a person cannot waive a right of which he is unconscious—the requisite knowledge may take the form of evidence directly affecting the party, or affecting him indirectly by means of the doctrine of "imputed" knowledge. Thus, if in *Joel's* case (*supra*) the medical examiner had been called, and it had transpired from his evidence that his brother had told him all about his attendances on the assured and of the calling in of the specialist as to her mental condition, it cannot be doubted that the knowledge of the medical examiner, though never passed on to the insurers whose agent as a medical examiner he was, would have been imputed to his principals. Such a situation indeed would have been entirely within the doctrine of imputed knowledge, with all the limitations on that doctrine of which Lord Halsbury had been at pains to remind the House of Lords in *Blackburn Low & Co. v. Vigors*, [1887] 12 A.C. 531, 537.<sup>1</sup>

<sup>1</sup> See the passage cited at p. 90, *ante*.

7. *The Premium.*

The topic of premium, the due payment of which on the part of the assured is the consideration moving from the assured to the insurer, whereby, as lawyers say, the contract with its attendant risks and obligations on the latter's part is "supported", has already been the subject of discussion earlier in this treatise.<sup>1</sup> The reader will there find the circumstances which, under the Indian Contract Act, entitle the assured or those who stand in his shoes to a return of premiums paid. The principles there enunciated are as much applicable to policies of life insurance as to any other form of contract the object of which is to assure a sum of money.

The rights and remedies of which the insurer may avail himself should the premium be not paid in accordance with the relative stipulations appearing in the contract have already been discussed earlier in this present Chapter.<sup>2</sup> It remains to say something of the rights and remedies available to the assured in cases where he shows himself ready and willing to perform his part of the contract, but the insurer proves obstructive and unwilling to perform his.

As from the nature of the contract all that the insurer, generally speaking, undertakes to do is to make the payment required of him under the policy in accordance with the factors of time and title which condition it, the more common breach of the contract on the part of an insurer takes the form of a refusal to accept the premium when tendered. Whether he be justified in refusing such a tender must in every case be a question of mixed law and fact, depending upon the particular circumstances surrounding the refusal. Supposing, however, that an insurer, without justification so to do, declines the premium tendered, the assured may at his option treat the contract as at an end and sue for damages there and then, or bide his time and sue for specific performance later on, i.e., when the occasion for enforcing the contract arises. (*Brewster v. National Life, etc.*, [1892] 8 T.L.R. 648.) This is to make use of his rights under sections 38, 39 and 75 of the Indian Contract Act: the measure of damages being governed by section 73 of that statute. Under the law of India the right to a decree for specific performance is the subject of special enactment to be found in Chapter II of the Specific Relief Act (I of 1877) comprising sections 12-30.

In *Shanghai Life Insurance Co. v. Brown*, [1916] 32 I.C. 534, it was held that once an insurer wrongfully refuses to accept a premium tendered, the assured is not bound to go on tendering successive premiums in order to save his rights to recover the policy money.

But if he is to recover the policy money at all, it can only be by exercising his option to treat the policy as subsisting, and by suing for specific performance of it when it matures, when the requisite performance, *ex hypothesi*, must take the form of paying over the policy money, though, in such a case, equity would allow the deduction therefrom of the aggregate of the premiums still due and payable under the contract.

If, however, the assured elects to treat the contract as at an end and to sue for damages, the damages allowable will be the total of premiums up to then paid. (*Brewster v. National Life, etc.*, *supra.*) And, though in general, interest is not allowed on damages, the enjoyment by the insurers of the premiums paid with the interest thereon and the loss

<sup>1</sup> See Chapter III, pp. 80-82, *ante*.

<sup>2</sup> See pp. 429-433, *ante*.

of the same to the assured, would entitle the latter to interest at a reasonable rate.

Premium can, of course, be recovered back where for one reason or another the risk never attached, *e.g.*, where a policy never issued in spite of premium having been paid. In such a case the basis of the claim to the return of the premium is not compensatory, but in respect of a consideration which has wholly failed. The form of action in such a case is a claim to recover the precise sum of money paid to the insurer as "money had and received by the defendant to the use of the plaintiff".

## 8. *The Claim.*

**Preliminary.**—No matter what be the form of the policy or the kind of insurance—in a mercantile sense—which it is designed to subserve, so soon as it matures the claim made under it arises primarily from the contract, and unless it can be brought within the four corners of that contract it may, on that ground alone, if on no other, be successfully resisted. The foregoing proposition may to some readers appear too obviously true to need statement. But the history of insurance litigation is replete with instances of its truth having escaped notice. Thus the claim must be made upon the basis of what the insurer has *in toto* undertaken to do. It follows that he cannot be called upon to go outside the obligations which he has assumed.

The obligation to pay money involves payment to some particular person—using the word "person" in the widest sense known to the law. Without some direction as to the payee the insurer could not fulfil the primary undertaking to pay out. Hence arises the usage which in the language of insurance is known as "nomination", to which the Insurance Act, 1938, gives statutory recognition and for which it makes special provision.

Since the rights under a policy of insurance on human life are a species of property, it follows that he who is in the enjoyment of them has the power to dispose of them. He may accordingly make a present of them. He may bequeath them. He may sell them. He may mortgage them. Or he may make them the subject-matter of a trust for the ultimate benefit of one or more persons. Where the assured does not claim to enjoy the benefits himself, the insurer is obliged to recognise the effect of the assured's exercise of those powers of disposal to which allusion is made. But, although there may be thus attracted other branches of the law, such as that which is concerned with the transfer of property, or with trusts, everything which by reason of the law thus attracted the insurer may be compelled to do is seen to arise, on last analysis, from the law regulating the original contract between him and his assured.

Again, because the benefits under a policy of life insurance are property, the monies payable under it may be inherited. For the same reason they form part of the assured's estate, and may if he become bankrupt, be sold for the benefit of his creditors. The commonest way of transferring the benefits under a life policy has been and still is by "assignment". Assignments of life policies in India are now governed by the provisions of the Insurance Act, 1938. But the statute in terms preserves all rights which assignees enjoyed under the pre-existing law in respect of assignments made prior to the 1st of July, 1939.

**Nomination.**—According to the law of England a payee or nominee of the monies assured by a policy is nothing more, in general, than an agent to receive the money, which money remains the property of the assured and at his absolute disposal during his lifetime, and forms part of his estate on his death, the payee or nominee taking no beneficial interest in it. This view of what may be called the “mere nominee” has been held to be the law in India. (*Krishna Lal Sadhu v. Pramila Bala Dassi*, [1928] 32 C.W.N. 634.) The Court in that case (Rankin, C.J., and C. C. Ghose, J.) considered that the Married Women’s Property Act (III of 1874) did not apply. Consequently section 6 of that Act (to which reference will be made hereafter) could not be called in aid of the plaintiff’s case. Holding, as they did, namely that mere nomination of a wife as the payee under a policy of life insurance did not of itself create a trust in her favour, they regarded the plaintiff as having no *locus standi* to sue on the contract. In so holding they followed, and indeed cited, the observations of Lord Esher, M.R., in *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 137. The ratio of the decision on that point being that the widow was not a party to the contract, and consequently that the right to sue in the particular circumstances passed to her husband’s legal representatives. The High Court of Bombay (*Shankar v. Umabai*, [1913] 37 Bom. 471) had taken a similar view and had followed *Cleaver’s* case. Since *Cleaver’s* case the position of a mere nominee had been considered in *Re Griffin*, [1902] 1 Ch. 135, which in part overruled *Caddick v. Highton*, [1901] 2 Ch. 476, n, and in a still later case *Griffiths v. Eccles Provident Industrial Co-operative Society*, [1911] 2 K.B. 275, 285, where, however, some observations attributed to A. L. Smith, L.J., in *Bennett v. Slater*, [1899] 1 Q.B. 45, were made the subject of comment by Farwell, J., who said that “he did not for a moment believe that the learned Lord Justice intended to assert that the right of alienation which is the ordinary incident of property was taken away because the member<sup>1</sup> had exercised his power of nomination.” Farwell, J., added that, speaking for himself, he did not think that an ordinary incident of property, such as the right of alienation, could be so taken away.

The case of *Parmeshwari Bai v. Nihalchand Lalchand*, [1938] Comp. Cas. (Ins.) 1, decided by a bench of the Judicial Commissioner’s Court of Sind does not really run counter to the view of a “mere nominee” as expressed in the English and Indian cases above alluded to. What the Court of the Judicial Commissioner had to deal with in the last-named case was a contention by the sons of the assured that their mother, as the payee nominated in the policy, was *ipso facto* a trustee for them. The Court held otherwise, and, applying the well-established canon of construction that the words used in a policy must be construed in their plain, ordinary and popular meaning, held that the widow was a mere payee and in no sense a trustee.

Many of the former controversies in India upon the subject of nomination are rendered of no more than historical interest today by reason of the fact that, at any rate in respect of policies taken out upon a person’s own life, the effect of nomination is now subject to statutory enactment. Reference is here made to sections 39 and 94 of the Insurance Act, 1938, which came into force on the 1st of July, 1939. It is, however, to be noticed that the statute leaves entirely untouched the effect of nominations by holders of policies upon the lives of others. In this

<sup>1</sup> The case arose out of membership of a Friendly Society.

connection, therefore, a reference may usefully be made to the case of *Matin v. Mahomed Matin*, A.I.R. [1922] Lah. 145, where a policy had been taken out ostensibly by a lady whose husband had been paying the premiums. The payee named in the policy was the lady's step-son. On the life dropping, the husband claimed the policy monies, alleging that the policy was in fact for his own benefit, the son being a mere *benamidar*. The Court held that, even assuming the doctrine of *benami* to be applicable to transactions of the nature of insurance, whatever presumption might arise from the circumstance that the father supplied the money for the premiums was sufficiently rebutted by the fact that the son's name as the payee had been entered in the policy with the father's knowledge and consent. In the result the son was allowed to recover.

One of the controversies to a large extent settled by the provisions of section 39 of the Insurance Act, 1938, concerns the supposed conflict between the rights of an assignee and a prior nominee. By sub-section (4) a transfer or assignment of a policy made in accordance with section 38 automatically cancels a nomination. We shall see, in fact, that the provisions of the section recognise the right of a policy-holder on his own life both to nominate and to cancel a nomination, and generally to dispose of his property under the policy as he will, so long as he exercises his rights in accordance with what the section prescribes.

The student must be guarded against supposing that the words "nominate", "nomination", "nominee" are, strictly speaking, terms of art. To "nominate" only means to "name"; and it is in every instance a question of mixed law and fact—because it is a question of interpretation—for what purpose the person named in the policy has been so named. Thus by the expressions used it is to be seen if the nomination be that of a mere payee or, on the other hand, of a beneficiary for whose protection a trust is thereby created. It is part of the history of life insurance that husbands insuring their own lives often do so with the sincere intention that the policy monies should be enjoyed by their wives, but are seen to have failed in many instances to express that idea in unambiguous language on the face of the instrument or even in the proposal form.

When, in England, a married woman's separate estate became recognised and protected by special statutes (e.g., the Married Women's Property Acts of 1870 and 1882) specific trusts were created in favour of wives whose husbands had in taking out policies of insurance expressly stated upon the face of the instrument their intention that the wife should have the benefits secured by the policy. Similar statutory trusts have been created in India by a corresponding piece of legislation, i.e., by the Married Women's Property Act (III of 1874). A beneficiary or beneficiaries—for the benevolent protection created by the statute extends to the children of the marriage—under section 6 are thus taken altogether out of the category of "mere nominees", in the sense in which those words have been used earlier in the present Chapter. By sub-section (7) of section 39 of the Insurance Act, 1938, the rights of beneficiaries under section 6 of the Married Women's Property Act are left unassailed, since the whole section dealing with the subject of nomination by a policy-holder is made inapplicable to policies which are within section 6 of the Married Women's Property Act.

The provisions of section 39 of the Insurance Act may be thus summarised.<sup>1</sup> By sub-section (1) the holder of a policy of life insurance

<sup>1</sup> The section is set out in Appendix I, pp. xxiv, xxv, *post*.

on his own life (but not if he is an absolute assignee of the benefits under the policy) may, either at the time of taking out the policy, or at any subsequent time before the policy matures, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death.

Certain matters appearing in this sub-section may be commented upon. First as to the exception expressed by the words "not being an absolute assignee of the benefits under the policy". The effect of this exception may be best explained by illustration. Suppose A to take out a policy on B's life and then to assign to B all the benefits under the policy in the manner required by section 38 (which deals with the method of creating a valid assignment). B thus becomes the holder of a policy of life insurance on his own life, but also an assignee of the benefits under it. He thenceforward cannot (by reason of having become an assignee of the benefits) exercise those rights of nomination such as any other holder of a policy on his own life might do under the statute. Secondly, as already observed, the sub-section has nothing to say upon the subject of nomination by those who have taken out policies of life insurance *sur autre vie*. Lastly, it would seem to exclude by necessary implication any permission to nominate a payee under an endowment policy whether on a person's own life or on that of another. That the section is to be so construed would appear further by reference to the terms of sub-section (5) which provide that where a policy matures during the lifetime of the person whose life is insured the policy monies become payable either to the policy-holder or to his heirs or legal representatives or to the holder of a Succession Certificate, as the case may be. This sub-section plainly excludes nominees in such a case altogether. Yet there is nothing in principle to prevent a man taking out an endowment policy on his own life in India and nominating his wife or any relation (other than his heirs) in Great Britain as the payees to receive the money on the policy maturing. It would seem, however, that an insurer who is subject to the Insurance Act, 1938, might regard himself as not bound to honour any such nomination.

By sub-section (2) a nomination within sub-section (1) to be effectual must either be incorporated in the actual text of the policy or be made the subject of a special endorsement thereon; and in the latter case it will not be effectual unless and until its terms shall have been communicated to the insurer and by him registered in his records relating to the policy.

The same sub-section expressly provides that the policy-holder may at any time prior to the policy maturing cancel any such nomination as he may have made under the statute, or change it; but to be effectual such cancellation or change must be made by a corresponding endorsement on the instrument or by Will. It is lastly by the same sub-section provided that the insurer shall not be liable for any payment under the policy which he has in good faith made to the policy-holder's nominee (where the same has been mentioned in the text of the instrument or registered by the insurer), even though such nomination may have been cancelled or changed, unless such cancellation or change has been communicated to him by the delivery of an appropriate notice in writing. It is conceived that such a notice, if it is to impose a liability on the insurer, must arrive in sufficient time to prevent payment to the original nominee.

By sub-section (3) a policy-holder is entitled to receive from the insurer an acknowledgment of having registered a nomination, a

cancellation, or a change. The insurer is not entitled to charge any fee for registering an original nomination; but is entitled to be paid a fee, not exceeding one rupee, for registering each and every cancellation or change.

By sub-section (5) on an endowment policy maturing or in other cases where the nominee or nominees die before the policy matures, the policy monies are payable to the policy-holder or to his heirs or legal representatives or to the holder of a Succession Certificate, as the case may be.

By sub-section (6) where the nominee or nominees survive the life insured, the policy monies become payable to such survivor or survivors.

It follows from the mandatory provisions as to payment to nominees or to others named in the foregoing sub-sections, that those who are thus made statutory payees under section 39 can give a valid discharge to any insurer who has carried out the duties as to payment prescribed by the section, no matter who the true legal owner of the monies may in certain eventualities turn out to be. Thus are avoided some of the difficulties which have beset insurers in England.<sup>1</sup>

**Trusts under Married Women's Property Act.**—As has already been observed, what at first sight may appear a nomination of no more than a payee or agent to receive, may yet be intended to create a trust. Although in what follows the attention of the reader is primarily to be directed to trusts within section 6 of the Married Women's Property Act, 1874, the student must be guarded against supposing that trusts within section 6 of that Act are exhaustive of trusts which may be created by words appearing upon the face of the instrument or deemed to be incorporated therein.<sup>2</sup>

We have now to consider the trusts which are creatures of section 6 of the Married Women's Property Act mentioned above. In this connection the reader is referred to the brief description of the purpose of this statute and its connection with the English statute of 1870 which is offered in Chapter II of the present treatise,<sup>3</sup> and especially to the provisions of sections 5 and 6 of the statute there fully set out. Considerations of space preclude a reprint of those sections in the present Chapter.

The case-law to which reference will now be made has all turned upon the interpretation to be placed upon the words: "A policy of insurance effected by any married man on his own life and expressed on the face of it to be for the benefit of . . . shall enure and be deemed to be a trust for the benefit of . . .".

All the controversies, such as they are, have turned upon the question whether the words used in the particular instance amount to an expression on the face of the policy that the monies are for the benefit of the wife or the children of the marriage or all or any of them.

A strong bench of the High Court at Madras<sup>4</sup> in *V. E. R. M. K. Krishnan Chettiar v. Velayee Ammal*, [1938] Comp. Cas. (Ins.) 101 (F.B.), held that the word "policy" in section 6 is to be construed to mean the document or documents evidencing the contract. In so holding, the Court was doing no more than interpreting the word "policy" for the

<sup>1</sup> See Macgillivray, *op. cit.*, 2nd Ed., p. 566.

<sup>2</sup> The creation of private trusts and trustees is, in India, in general governed by Chapter II of the Trusts Act (II of 1882) which includes secs. 4-10 of that statute. See an example referred to on p. 449, *post*.

<sup>3</sup> See pp. 22-24, *ante*.

<sup>4</sup> Leach, C.J., Madhavan Nair and Varadachariar, JJ.

purposes of the section in the way in which the word is interpreted generally in the law relating to insurance. In the particular instance the proposal was expressly agreed between the parties as incorporated in the policy. For the purpose of determining whether there was a trust within section 6 the Court considered itself at liberty in those circumstances to look at the proposal in which the words relied upon appeared.<sup>1</sup>

But another bench of the same High Court (*Venkatasubramania Sarma v. United Planters Assn.*, [1938] Comp. Cas. (Ins.) 17) had arrived at a different opinion. In that case, however, there was not only nothing in the instrument itself which in any way attracted section 6 but, in the proposal, against the words "to whom payable" appeared the words "the proposer's assigns or his proving executors or administrators or other legal representatives who shall take out representation from any British Court to his estate or limited to the monies payable under this policy". There was thus in the case before them nothing in the words relied upon which could possibly be read as creating a trust within section 6. Moreover in *Krishnamurthi v. Arijayya*, [1936] M.W.N. 559 (to which the Court referred), the words in the policy there relied upon read, against the words "to whom payable", "to the person or persons legally entitled thereto". This policy did not expressly attract the proposal. Yet the Court was asked to read into the policy what was stated in the proposal, namely, that the object of the insurance was "the maintenance of the family". This Venkatasubba Rao, J., refused to do, contenting himself with observing, in passing, that the word "family" was much wider than wife and children. Looking at the policy alone, he held the words found there not to fulfil the requirements of section 6, although he held that to fulfil such requirements it was not necessary that the words used should be identical with those occurring in the statute. On the facts, therefore, in *Venkatasubramania Sarma's* case, the bench could fortify itself with the views expressed in the case just cited. But their Lordships went further than was perhaps strictly necessary to the decision of the matter before them and delivered themselves of the following opinion: "We think" they said "the terms of Section 6 of the Married Women's Property Act are clear and unambiguous and that the expression 'policy of insurance' in that section is to be taken in the ordinary meaning of the words. The provision was passed in order to create a trust in favour of wife or wife and children. For this purpose it is enacted that the policy which is to create such a trust must be 'expressed' on the face of it to be for the benefit of the assured's wife or wife and children. This we think is clearly intended as, *inter alia*, a measure of protection for persons who might be induced to take an assignment of the policy. If there is an expression on the face of the policy that the policy is for the benefit of the assured's wife or wife and children, the prospective assignee will be put on his guard. This would certainly not be the case if the term 'policy of insurance' were interpreted to mean the proposal as well as the company's prospectus."

It is submitted that the better opinion is that of the full bench in *Krishnan Chettiar's* case cited above. That bench had fortified itself with two English decisions for the purpose of meeting the difficulty

<sup>1</sup> In similar circumstances another bench (Cornish and King, JJ.) of the same High Court had independently arrived at the same conclusion. There the policy attracted the proposal. (*Bengal Insurance & Real Property, etc. v. Velayammal*, [1937] 7 Comp. Cas. 149.)

created by the use of the words "on the face of" [the policy] which occur in the section. In the first of these (*Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving, etc.*, [1923] 50 I.A. 324) the Judicial Committee had to construe what was meant by an error on the "face" of an award; and the question was whether a document referred to in the award could be read as part of the award. Lord Dunedin in delivering the judgment of the Board said: "An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated therein, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous." In the other case (*F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society*, [1933] A.C. 592) the award in suit recited the contract between the parties and made a reference to the provisions of condition 30 thereof. The House of Lords held that condition 30 was incorporated into and formed part of the award, just as if the arbitrator had set it out *verbatim* and had then proceeded to state the construction which he placed upon it.

It remains to consider the second of the difficulties which have arisen with regard to section 6 of the aforesaid statute, namely, what form of words will suffice to create a trust within the meaning of the section.

In both of the specimen policies used for purposes of illustration in the foregoing pages of this Chapter the Schedule appearing on the obverse of the instrument is content to ask "to whom payable". But the fact is that in a great number of proposal forms space is provided for an answer to the question "for whose benefit". If the schedules appearing on Indian policies provided space for a clear statement as to who was intended to *benefit* by the monies assured, the principal difficulty would be removed. In the absence of anything of the kind, the Courts both in India and in England have had to interpret short statements appearing in answer to the question "to whom payable".

So far back as *Balamba v. Krishnayya*, [1914] 37 Mad. 483, a full bench held that where on the face of the policy the husband stated it to be for the "benefit" of his wife or his wife and children or any of them, but to be "payable" to his executors, administrators and assigns, and died leaving a daughter, a trust was created in favour of the daughter within section 6 of the Act of 1874, against which the creditors of the assured could not proceed.<sup>1</sup>

The foregoing decision was followed by the same High Court in *Parinam Rama Rao v. Parinam Kristnamma*, [1929] 52 Mad. 936, which took note of the effect of Act XIII of 1923 but treated the amendment as apparently unnecessary in the case of Hindus in Madras and considered section 6 of the Married Women's Property Act to have applied to policies effected before 1923 by members of that community.

<sup>1</sup> The Calcutta High Court in *Krishna Lal Saha v. Pramila Bala Dassi*, [1928] (ante), noted that the Madras High Court in this case had applied it to spouses professing the Hindu religion, whereas the Married Women's Property Act, 1874, as then enacted, did not in terms make it applicable to persons professing that religion. And on that ground they declined to follow the Madras decision. By the date of the Calcutta decision, however, the statute had been amended by Act XIII of 1923 so as to extend it to Hindus in Madras with effect from the 1st January, 1914, and elsewhere in British India from the 2nd of April, 1923. The policy in the Calcutta case was issued in March, 1910. Anyhow, the Calcutta Bench considered the words used in the policy to make the wife no more than a mere agent to receive payment.

In 1932 the High Court at Madras decided the case of *Abhiramavalli Ammal v. Official Trustee of Madras*, [1932] Comp. Cas. 201; 62 M.L.J. 111. The decision is that of a single judge (Madhavan Nair, J.) but it has been accepted as good law. In the particular instance, in the Schedule appearing on the face of the policy, and opposite the words "to whom payable", was the statement "the assured or his wife Abhiramavalli if he predeceases her". The Court considered the English decision *Re Fleetwood's Policy*, [1926] 1 Ch. 48, which turned upon the effect of section 11 of the Married Women's Property Act, 1882. The material words of the last-named section read: "a policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children, or any of them . . . shall create a trust in favour of the objects therein named . . .". By the terms of the policy the insurance company agreed to pay the sum assured to the assured's wife if she were living at his death, or, in the event of her prior death, to pay to his executors, administrators and assigns. The policy contained a proviso that if at the end of twenty years the insured was still living he should have the right to exercise any of some six specified options. At the date of maturity the insured was still alive, and he purported to exercise his option to receive the entire cash value of the policy with its share of accumulated profits and to discontinue it. The insurers declined to pay over to him unless the wife joined in giving them a discharge; and eventually they paid it into Court. The Court construed the agreement between the parties to the contract of insurance as creating a trust within section 11 of the Act of 1882 in favour of the wife in certain events; secondly that the assured must be taken to have exercised the option for the benefit of the trust, and, in consequence that unless the husband and wife came to an agreement the fund must be accumulated in Court until it could be ascertained by the death of either party who was entitled to it. Madhavan Nair, J., noted that section 11 of the Act of 1882 did not contain the words "on the face of it", which had appeared in section 10 of the Act of 1870 from which the Indian Act of 1874 largely took its shape. But the point was clear that the Chancery Division in England had held the words in *Fleetwood's Policy* to be an expression of intention to benefit the wife in a certain event. His lordship took note also of an earlier decision in India (*Srinivasachariar v. Ranganayaki Ammal*, [1915] 32 Ind. Cas. 991), in which the material facts were that under the terms of the policy the amount assured was payable to the assured or to his wife in case of his earlier death. It was held that the sum assured did not form part of the deceased's estate, but that the widow was the beneficiary who became entitled to the money on her husband's death. Regarding the foregoing decisions as safe guides, his lordship held the language used in the policy to constitute an expression that it was for the benefit of the wife although the express words "for the benefit of his wife" did not appear in the terms of the policy. It was thus within section 6 of the Married Women's Property Act, 1874, and there was a statutory trust in favour of the widow.

The foregoing decision was followed in two other Madras cases to one of which Madhavan Nair, J., was himself a party. (*Kannayalal v. S. Subbaraya Chetty*, [1938] Comp. Cas. (Ins.) 62 (Pandrang Row, J.), and *V. E. R. M. K. Krishnan Chettiar v. Velayudh Ammal*, a decision of the Full Bench (*supra*)). Meanwhile, however, another single judge of the same Court (Gentle, J.) had had before him the case of *Lalithambal Ammal v. Guardian of India Insurance Co.*, [1937] Comp. Cas. 157, in which the express question, asked in the Schedule, "for whose benefit

and to whom payable" had been answered "the assured, or his wife if he predeceases her". The relevant other fact was that two days after effecting the policy, the assured purported to assign it by a proper endorsement, wherein the assignment was expressed as for valuable consideration, the assignee being the Travancore National Bank. During the currency of the policy the assured died. The widow claimed against the insurers on the basis of a trust. It was held, that there was no vested interest, and the trust could only take effect after the assured's death. Consequently he had a power of disposal during his lifetime and the assignment was therefore good. *Abhiramavalli Ammal's case (supra)* was not cited.

In *Kannayalal's case (supra)* Pandrang Row, J., expressly dissented from the decision of Gentle, J., in the case cited above.<sup>1</sup>

The decision of Gentle, J., above alluded to was recently considered by a judge of the Calcutta High Court (Ameer Ali, J.) in the matter of a policy taken out by one *Haricharan Ghosh*<sup>2</sup> who had left a Will by which he purported to dispose of the proceeds of an insurance policy taken out by himself with the *Sun Life, etc., of Canada* on his own life. By the terms of the relative policy the same was payable to the assured on January 1, 1950, or to his wife Ashalata Dassi in the event of his death prior to that date, or, in the event of her death prior to that of the assured and in case the assured was alive on that date, to the assured, or in the event of her death prior to that of the assured and in case the assured was not alive, then to his executors, administrators and legal representatives. The assured died on the 19th of November, 1938. Probate proceedings were started and in an application on the part of the executor an issue was set down for trial as to who was entitled to the policy monies, the widow or the executor. For the widow it was contended that there was a valid and subsisting trust in her favour within section 6 of the Married Women's Property Act, 1874, and that the provisions of the Will, so far as the same purported to dispose of the policy monies, were inoperative, and that she was entitled to receive the monies. For her was cited a number of English decisions, namely *Joakimidis v. Hartcup*, (1925) 2 Ch. 403; *Re Fleetwood's policy (supra)*; and *Cousins v. Sun Life, etc., of Canada*, [1933] 1 Ch. 126. In the latter case the policy had been effected upon the assured's own life and expressed to be for the benefit of his wife named in the policy; and the decision of the Court was that in a policy so effected the wife took an immediate vested interest. Ameer Ali, J., held on the facts that the wife took a vested interest under the policy and the same would pass to her heirs if need be. The monies could not revert to her husband's estate. She was alive and the trust could take effect. The Act did not say that it should be wholly or solely for the benefit of the wife. His lordship had no hesitation in holding that the endowment policy on the death of a husband fell within section 6, and the fact that the wife's interest was rendered contingent by the terms of the nomination did not affect the trust. The issue was decided in favour of the trustee for the widow.

<sup>1</sup> *Dinbai v. Bomanshaji Jamarji*, [1933] 58 Bom. 513, so far as it seemed to hold that a trust within sec. 6 needed words expressly mentioning "benefit" was also dissented from. But the judges in that case did not consider there was enough evidence to show what was the intention of the assured.

<sup>2</sup> In re sec. 6, Married Women's Property Act, 1874, and *In re Sm. Ashalata Dassi*, [1940] 44 C.W.N. 218; decision of Gentle, J., dissented from.

It is not easy to reconcile the foregoing decisions. Gentle, J., sought to distinguish between an immediate vested interest, as where the words relied upon expressed the policy as for the benefit of the wife *simpliciter*, and words which rendered her interest contingent only upon surviving her husband, and thereby postponing any vesting till that contingency should have occurred. In the latter class of case he seemed to consider that the husband, while alive, had a complete power of disposal in the matter of the policy monies and could thus make a valid assignment the effect of which would bar the operation of the trust. Ameer Ali, J., had to consider the case of a Will which could not take effect till the testator's death. But the latter's death would, on any reading of the policy before him, bring the trust in favour of the wife into immediate operation.

As was pointed out by the full bench in *Krishnan Chettiar's case*, *supra*, a contingent trust is recognised in England and that the decision in *Fleetwood's policy* was an authority for regarding a contingent trust as one which would nonetheless be a trust in favour of a wife or children within section 6 of the Married Women's Property Act, 1874. It is submitted that this is the true view of the matter; and that in such a case there can be no disposal of the policy monies by the husband after the creation of the trust which would not be affected by the equities thus set up. To the extent that the judgment of Gentle, J., may be taken as holding that in spite of the creation of a contingent trust in favour of the wife the husband could make such an assignment as would defeat it, the case, it is submitted, was wrongly decided. For it is submitted that if the case falls within section 6 at all, an assignee could only take subject to the equities. It may be noted in passing that it was decided so far back as 1895 in Australia (*Twaddell v. New Oriental Bank*, [1895] 21 V.L.R. 171) that a policy of insurance effected by a man on his own life and expressed to be for the benefit of his wife and children cannot be pledged by him by way of security so as to create a lien in favour of the pledgee.

It is to be noted, however, that by the provisions of sub-section (5) of section 38 of the Insurance Act, 1938, a transferee or assignee of benefits under a policy of life insurance is now made expressly subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment as the case may be. The provisions of the section, however, while governing all assignments made after the 1st of July, 1939, do not interfere with the rights and liabilities of parties under assignments made before the last-mentioned date. It is submitted, however, that by the pre-existing law no assignment of a policy which can be properly construed as creating a trust within section 6 of the Married Women's Property Act could be otherwise than affected by the equities thus created. If this submission correctly represents the pre-existing law, as also the effect of section 39 (5) of the Insurance Act, 1938, an immediate vested interest within section 6 cannot be defeated by any prior assignment; and the same result is brought about in the case of a contingent trust, on the happening of the contingency.

**Who can sue to enforce the trust.**—Clause 2 of section 6 (1) of the Married Women's Property Act provides that when the sum secured becomes payable it shall be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy

or such of them as are then existing, unless special trustees have been duly appointed to receive and hold the monies. It is further provided that the Official Trustee when receiving and holding the monies shall stand in the same position as if he had been appointed trustee by a High Court under Act XVII of 1864, section 10. The last-mentioned Act was passed to constitute an office of Official Trustee. The foregoing clauses need amendment for several reasons, as we shall see. But, in the first place, an insurance may be effected in an office which is not situated in any of the three Presidencies. What then?

*Lakshmi Ammal v. Sun Life, etc., of Canada*, [1934] 4 Comp. Cas. 101, was a case in which a widow sued, purporting to be a beneficiary under section 6 of the Married Women's Property Act. She had been in correspondence with the Official Trustees both of Madras and Bengal, but up to the date when her suit came on for hearing had been unable to persuade them either of her own *locus standi* under the Act, or of their own jurisdiction in the matter. The Court held that the proper person to enforce the trust (assuming it to have been created) was the Official Trustee of the relative Presidency. It was argued for her, however, that she was in the position contemplated by section 59 of the Indian Trusts Act. That section reads: "When no trustees are appointed or all the trustees die, disclaim or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust . . .". The Court held, however, that the Official Trustees neither of Bengal nor of Madras had refused to act, and consequently that the provisions of section 59 of the Trusts Act were of no avail to the plaintiff. The policy in suit dated from 1906 and the Court considered that it was outside the purview of the Married Women's Property Act.

The same opinion as to the person qualified to sue was taken by a bench of the Madras High Court (Cornish and King, JJ.) in *Bengal Insurance and Real Property Co., Ltd. v. Velayammal*, [1936] 7 Comp. Cas. 149.

In *Haridasi Debi v. Manufacturers Life Assurance, etc.*, [1936] 41 C.W.N. 517, Lord-Williams, J., held that the Official Trustee mentioned in section 6 is not the legal person referred to in the Official Trustees Act of 1913, who is a corporation sole.<sup>1</sup> The Official Trustee referred to in section 6 was the creature of section 10 of Act XVII of 1864, a statute which was in operation when the Indian Married Women's Property Act was passed. But the office of trustee so created no longer exists, and to that extent the provisions of section 6 cannot be put into operation. The result is that to enforce the provisions of that section trustees must be appointed either by deed executed by the husband in his lifetime, or by the court under the powers which it has to appoint trustees under the Indian Trusts Act (II of 1882). It is not, therefore, necessary to appoint the holder of the office created by the provisions of the Official Trustees Act, 1913, nor is it necessary for the court to appoint more than one trustee, as there is nothing in the Act providing that any particular number of trustees must be appointed. Moreover, the beneficiary may prosecute the suit against the insurers without impleading the trustee as a party; but, in that event, though the beneficiary may succeed, the insurers may say that they will pay the money only to a trustee duly appointed.

<sup>1</sup> For the meaning of this expression, see Chapter II, p. 20, *ante*.

In *Shamdas Gobindram v. Savitribai*, [1937] Comp. Cas. 267, one of the judges of the Court of the Judicial Commissioner of Sind had observed that "in order to attract the applicability of section 6 of the Married Women's Property Act, 1874, the policy must be expressed to be for the benefit of the wife or children, and money should also be made payable to the Official Trustee. Until these two conditions are fulfilled there can be no statutory trust in favour of the wife." These observations have been expressly dissented from by a Division Bench of the same Court in *Parmeshwari Bai v. Nihalchand Lalchand*, [1938], *supra*. "The object" said the learned Judges "is to create a valid trust in respect of the policy monies without any trust deed or any other document being executed either in favour of the beneficiary or in favour of a trustee . . ." The observations thus adversely criticised find no support elsewhere and may, it is submitted, be considered as based upon a misconception of the statute and its aims.

**Trusts under section 5 of the Trusts Act.**—One illustration of the effect of a trust created otherwise than by operation of section 6 of the Married Women's Property Act, 1874, must suffice.

A member of the Times of India Employees' Death Benefit Fund died. Under the rules the amount due under a policy with the said fund vested in certain trustees and was payable to the children of the deceased member. In a suit against the executors of the deceased a decree was obtained as also an order attaching the interest of the deceased in the aforesaid fund. A bench of the Bombay High Court (Beaumont, C.J., and Kemp, J.) held that, in the events which had occurred, the deceased himself had no interest in the fund or any disposing power over it, there being a valid trust under section 5 of the Trusts Act. Thus the interest of the deceased had been transferred to the trustees and there was nothing for the attachment to operate upon. Their lordships further expressed the opinion that where a policy of life insurance effected by A provides that either on the death of A or at the expiration of the particular period the insurers will pay the sum assured to B, that does not confer any contractual right upon B nor does the taking of the policy in that form create a trust in favour of B. Consequently on the death of A or on the expiration of the specified period, the executors of A, or A himself, as the case may be, are the only persons who can recover the fund from the insurer, and B has no claim to it. (*Nadershaw J. Vachha v. The Times of India Employees' Death Benefit Fund*, [1932] 2 Comp. Cas. 8.)

**Claims to inherit.**—The reader's attention has already been directed to conditions imposed by most modern policies of life insurance, putting the claimant to proof of his or her title.<sup>1</sup> Apart from any such stipulation in the contract itself, the insurers will be entitled to satisfy themselves for their own protection that they would be justified in paying out in answer to any particular claimant's requisition. This course is especially necessary where the claim is made by someone purporting to be the heir or legal representative of the assured or of some other person entitled to the policy monies. Thus insurers commonly insist upon Probate or Letters of Administration, or, at least where it is an alleged heir who is the demandant, a Succession Certificate. That an insurer is justified

<sup>1</sup> See pp. 417, 418, *ante*.

in law in taking up such an attitude is sufficiently plain from the following, among other, authorities:—

In *Vithal Rao v. Hanumantha Rao*, [1927] 50 Mad. 412, the Court held that a Succession Certificate could be granted to the heirs of the assured, inasmuch as the policy monies formed a debt within the meaning of section 4 of the Succession Certificate Act. In *Sugandhabai v. Kashar Bai & Ors.*, [1933] 3 Comp. Cas. (Ins.) 5, the District Judge at Amraoti had dismissed the appeal of a widow against an order of the Subordinate Judge refusing her a Succession Certificate in respect of a policy of insurance upon the life of her deceased husband. Concurrent findings of law were to the effect that by the personal law of the Jains a widow had power of disposition only over her husband's self-acquired property. On the matter coming before the Judicial Commissioner's Court of Nagpur the Court found, as of fact, that the policy had been taken out and kept up by monies which were the self-acquired property of the assured. Staples, A.J.C., in giving judgment, observed that it was no doubt true that in the case of joint-family property the *onus* of establishing that certain property was self-acquired and not joint is upon the person asserting it: there being a presumption that a member of a joint-family will, generally speaking, be spending the joint-family money. In the case, however, of a policy of life insurance no such presumption should be acted upon. A policy of life insurance is a personal contract between the person who is called the assured and the insurance company. It might be that an insurance policy could be taken out for the benefit of a joint-family. But the presumption would be against such a contract, and accordingly it would have to be proved that the policy was taken out with such an intention and purpose, and that the premiums were paid out of joint-family funds. Accordingly the Court held the widow to be entitled to a Succession Certificate.

That insurers are entitled to insist upon proof of title being afforded them in the form of a probated Will, Letters of Administration or a Succession Certificate is now settled by the following cases: *Gresham Life Insurance Society v. Collector of Etawah*, [1933] 3 Comp. Cas. (Ins.) 1: 54 All. 1026; followed in *Ashutosh Ghose v. National Insurance, etc.*, [1936] 6 Comp. Cas. 216.

In *Daw Yu v. Sun Life, etc., of Canada*, [1935] 5 Comp. Cas. 249, the facts were that the appellant obtained a decree in the Small Causes Court, Rangoon, against the widow of one Maung Wa. The latter had insured his life for Rs. 2,000 with the respondent company. The nominees mentioned in the policy were the assured's said wife and his son. The plaintiff's decree was against Ma Mai Hman personally and also as the legal representative of the assured. In execution, the appellant obtained an order in the nature of a *mandamus* prohibiting the insurers from paying out the money due under the policy. The order was badly drawn, inasmuch as in terms it purported to prohibit the widow from receiving the money at the hands of the insurers. The plaintiff-appellant then obtained a garnishee order calling upon the insurers to show cause why they should not pay into Court the debt due from them to the judgment-debtor Ma Mai Hman. The insurers defended on the ground that until Ma Mai Hman or some other person established her or his title by obtaining Letters of Administration or a Succession Certificate, there was no debt due under the policy. The Court, following *Cleaver v. Mutual Reserve Fund Life, etc.*, [1892] 1 Q.B. 47, held that apart from the provisions of the Married Women's Property Act the right to sue on such a policy would pass to the legal personal representative of the deceased, and

that, as between them and the insurers, a nomination in the policy of a person to whom the amount should be payable, would have no effect, because such a person was not a party to the contract of insurance; and that, accordingly, the insurers would be bound to pay the legal representatives of the deceased and no one else. Consequently, unless and until some person had established his or her title to represent the deceased, no "debt" became due under the policy. It was further held that as the parties were Burmese Buddhists there was no question of any trust arising under section 6 of the Married Women's Property Act, 1874. For the foregoing reasons the garnishee order was bad, there being nothing in the hands of the insurers in the nature of a debt which could be attached. (The widow had, at the time of these proceedings, not yet taken out Letters of Administration or possessed herself of a Succession Certificate.)

**Sale.**—Sale, by the law of India, is in general governed by the Transfer of Property Act (IV of 1882)<sup>1</sup> and the Sale of Goods Act (III of 1930). As policies of insurance and the rights created thereby are not "goods", the latter Act has no application to anything with which we are concerned in this Chapter.

The Insurance Act, 1938, includes certain special provisions concerning the transfer of policies of life insurance by assignment or otherwise,<sup>2</sup> while section 130 of the Transfer of Property Act expressly provides that nothing in that section is to affect the provisions of section 38 of the Insurance Act. As, however, section 38 of the last-mentioned statute expressly enacts, by sub-section (6), that any rights and remedies under assignments or other transfers effected prior to the 1st of July, 1939, are left undisturbed, it becomes necessary to refer in the present and the succeeding section of this Chapter to transfers or claims arising therefrom under the pre-existing law.

In 1894 the High Court at Madras had before it the case of an insolvent, among whose assets was a policy of insurance on his own life. The policy was sold by the Official Assignee. After the sale the insolvent obtained his final discharge; and, on his death, the Administrator General had the duty of dealing with the assured's estate. The purchaser had meanwhile collected the money from the insurers. It then transpired that the purchaser had bought the policy mainly for the benefit of the insolvent's estate. He, therefore, paid over the policy money, less what he had spent in acquiring it, to the Administrator General. On contest between the latter and the Official Assignee the Court held the Administrator General to be entitled to the amount in preference to the Official Assignee. (*In re Ackrill*, [1894] 18 Mad. 24.)

In *National Insurance Co. v. Haridas Basu*, [1927] 104 I.C. 729, an unusual point arose in relation to a sale. The material facts were as follows. In execution of a decree against the heirs of the assured the latter's rights under the relative policy were sold by the Court in an auction sale, the purchaser being a pleader practising in that Court. The pleader sued the insurer for recovery of the money due under the policy. The insurers contended that the plaintiff, being a pleader, was precluded by section 136 of the Transfer of Property Act from purchasing the policy, and the sale to him was void. It was held by a bench of the

<sup>1</sup> Certain extracts from this statute are printed as Appendix III to this treatise. See pp. cxviii-cxxiv, *post*.

<sup>2</sup> Sec. 38, which is set out in Appendix I. See pp. xxiii, xxiv, *post*.

Calcutta High Court that section 136<sup>1</sup> of the Transfer of Property Act, being controlled by section 2 (d) of the same, had no such effect, and that the purchaser, though a pleader, could enforce his claims against the insurer by suit after purchase.

**Transfers and assignments.**—As already observed, all transfers and assignments of policies of life insurance which are effected after the 1st of July, 1939, are governed by, and must be made in accordance with, the provisions of section 38 of the Insurance Act, 1938.<sup>2</sup> Before summarising the provisions of that section it is necessary to refer to the pre-existing law, inasmuch as the rights and liabilities incidental to transfers and assignments made in India prior to the 1st of July, 1939, are by sub-section (5) expressly saved. The following cases are therefore briefly commented upon for purposes of illustration.

In *Rajnarain Bose v. Universal Life Insurance, etc.*, [1881] 7 Cal. 594, the material facts were that one W. insured his life for Rs. 25,000. The insurer covenanted by the policy to pay the executors, administrators and assigns the sum assured within two months of the life dropping, provided all premiums had by then been duly paid. After paying the first premium W. assigned his rights by endorsement to B. Notice of assignment was given, but the assignment was not expressed as having been for consideration. B. paid all the premiums till his own death. When W. died the executors of B. claimed payment. The insurers stated that unless the executors obtained the authority or concurrence of W.'s representatives, they would not pay. The Court held that the law and practice required the assignee to sue in the name of the assignor, in which case the personal representative of the deceased would have been a necessary party. In India an assignee could sue in his own name in respect of marine and fire policies only. The insurers were, therefore, in this case justified in refusing to pay in the absence of any legal representatives of W.

In 1913 the Judicial Committee of the Privy Council had before them the case of *Mulraj Khatan v. Viswanath P. Vaidya*, [1913] 37 Bom. 198. This was a contest between an assignee under a written instrument and one who claimed to have got a prior equitable assignment by deposit of the policy. The material facts were that assured deposited his life insurance policy with the plaintiff in 1904 as security for certain advances. Neither of them gave notice of such deposit to the insurers. Later another creditor of the assured took an assignment as security, without notice of the prior deposit. The assured represented to the last-named creditor that he had mislaid the policy. An application was then made to the insurers for a duplicate copy. The latter, however, stated that they would require an indemnity from the assured before they would issue such a copy. An indemnity bond was then prepared; but the assured died before he could sign it. The plaintiff, claiming on the basis of an equitable assignment by deposit, sued the insurers for the money. The assignee by virtue of his instrument claimed to be the owner of the policy. The High Court at Bombay decided in favour of the purported equitable assignment. The Judicial Committee held that section 130 of the Transfer of Property Act covered transfers

<sup>1</sup> This is set out in Appendix III at p. cxxiv, *post*.

<sup>2</sup> A legal assignment is an "act and deed", which the written instrument merely records. Such an instrument when undated is an imperfect record and thus unreliable. The terms of sub-sec. (5) render the date of such an act and deed obviously material.

by way of security as well as absolute transfers; but that it specifically enacted that no charge could be created except by a written instrument. It followed that the plaintiff acquired no right to the policy or its proceeds by reason of the deposit. The positive language of the section precluded the application in India of those principles of English law on which the High Court at Bombay had based their decision.

In *Vinkileri Lakshmikutty Vettillamma v. Thekka Madathil Vishnu Nambisan*, A.I.R. [1939] Mad. 411, the facts were that the assured had assigned an endowment policy in favour of his wife by a proper endorsement. The assignment was notified to the insurers and by them registered. The endorsement stated that the benefit of all the monies which might become payable under the policy were assigned to the wife and declared her receipt to be a sufficient discharge to the insurers. By a further clause, however, in the same endorsement it was provided that in the event of his wife (the assignee) predeceasing him or in the event of his surviving the date on which the policy was to mature the benefits thereunder would revert to the assured (assignor) as if the assignment had not been made.

Before the policy matured and during the lifetime of the assignee the assured died.

In execution of a decree obtained against the deceased (assured) the decree-holder sought to attach the policy monies as assets of the assured in the hands of the assignee. *Held*, that upon the true construction of the endorsement the same did not amount either to a Power of Attorney or to a transfer *in futuro*, but operated as a present transfer in favour of the assignee, giving her an absolute interest in the monies. In the events that had happened there was no scope for the operation of the reverter clause.

The attention of the reader has now to be directed to the statute law, which since the 1st of July, 1939, governs transfers and assignments of policies of life insurance and consequently of the benefits thereunder. A transfer of property within the meaning of the Transfer of Property Act means an act by which a living person conveys property, in present or in futuro, to one or more other living persons, or to himself and one or more other living persons.<sup>1</sup> The expression "living person" includes a company or association or body of individuals whether incorporated or not.<sup>2</sup> By the law of India property of any kind may be transferred except where forbidden by the Transfer of Property Act or by any other law for the time being in force.<sup>3</sup> A transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof, unless a different intention is expressed or is necessarily implied from the manner in which the transfer is effected.<sup>4</sup> By the general law relating to the transfer of property a transfer may be made without writing in every case in which a writing is not expressly required by law.<sup>5</sup>

A "gift" is a transfer of property within the meaning of the statute which, indeed, provides for it in section 122.<sup>6</sup> A "pledge" does not involve a transfer within the meaning of the same statute, but under the law of India is regarded as a bailment made as security for payment of a debt or the performance of a promise. The bailor is called the pawnor and

<sup>1</sup> Transfer of Property Act, sec. 5.

<sup>2</sup> *Ibid.*, sec. 6.

<sup>3</sup> *Ibid.*, sec. 9.

<sup>4</sup> The section is set out in Appendix III, pp. cxxii, cxxiii.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, sec. 8.

the bailee the pawnee.<sup>1</sup> An assignment is only one of the methods by which "property", in the widest sense of the word, is made over to another; and its effect is, broadly speaking, the same as that which is achieved by a grant.<sup>2</sup>

By virtue of the provisions of section 38 of the Insurance Act, 1938, no transfer or assignment of a policy of life insurance (whether such transfer or assignment be with or without consideration therefor) is valid unless it be made by a separate instrument or by an endorsement upon the policy itself. In either case the operative words must be signed by the transferor or the assignee or by a duly authorised agent. It must, moreover, be attested by at least one witness.<sup>3</sup> The Act does not prescribe any particular form in which an assignment is to be cast.

By sub-section (7) the Act expressly recognises the validity of an assignment with a condition attached to it that it shall be inoperative, or that the interest shall pass to some person other than the assignee on the happening of a specified event during the lifetime of the life insured.<sup>4</sup> It also makes valid an assignment in favour of the survivor or survivors of a number of persons. To the foregoing provisions of the sub-section are prefixed the words "notwithstanding any law or custom having the force of law to the contrary".

Sub-section (2) provides that a transfer or assignment made in accordance with sub-section (1) shall be complete and effectual upon the execution (duly attested) of the endorsement or separate instrument. But the sub-section goes on to provide that except in cases where the transfer or assignment is in favour of the insurer himself, no such transfer or assignment will be binding on the latter, or will entitle the transferee, assignee, or the respective legal representatives, to sue the insurer for the policy monies, unless and until there has been delivered to the insurer a written notice of the transfer or assignment. Such notice, moreover, must be accompanied either by the policy duly endorsed, or the separate instrument, or a copy of such endorsement or instrument, which copy must be certified as correct both by the transferor and transferee or their duly authorised agents.

Delivery of the notice will be good if effected either at the place in British India (if any) mentioned in the policy for the purpose, or at the insurer's principal place of business in British India.

Upon receiving the notice above-mentioned the insurer is required to record the transfer or assignment together with the relative date as also the name and address of the transferee or assignee. The transferee or assignee or any other person by whom the said notice was given may require from the insurer a written acknowledgment of the receipt of such notice; and the insurer (though he may insist upon a fee for so doing not exceeding one rupee) must furnish such acknowledgment, which will thereafter be conclusive evidence against him that he has duly received the notice to which it relates.<sup>5</sup>

<sup>1</sup> Pledges are dealt with by the Indian Contract Act, *secs.* 172-181.

<sup>2</sup> See the brief discussion and derivation given in Chapter III of this treatise, p. 83, *ante*.

<sup>3</sup> Insurance Act, 1938, *sec.* 38 (1).

<sup>4</sup> Thus recognising and legalising *benami* transactions cloaked by pretended assignments.

<sup>5</sup> Sub-*sec.* (4). The section obviously contemplates such a Notice as a separate document. There is no room for a "constructive" notice by mere production of the instrument relied upon. A re-assignment by anyone other than the insurer himself needs notice to the latter.

Naturally an insurer may receive more than one notice in respect of purported transfers or assignments relating to one and the same policy. Where this is so, the date on which the relative notices are delivered to the insurer will regulate the priority of all claims under transfers or assignments as between persons interested in the policy.<sup>1</sup>

By section 39 (4) a transfer or assignment of a policy made in accordance with the foregoing provisions of section 38 shall automatically cancel a nomination.

If the transfer or assignment has been made in accordance with what is prescribed in the section, the insurer is bound, from the date of the receipt of the relative notice, to recognise the transferee or assignee named therein as the only person entitled to benefit under the policy.<sup>2</sup> But, as already pointed out in the foregoing pages of this Chapter, such a transferee or assignee is expressly stated in the section to be subject to all the liabilities and equities to which his transferor or assignor was subject at the date of the relative transfer or assignment. It is further provided by sub-section (5) that the transferee or assignee may institute any proceedings in relation to the policy without obtaining the consent of his transferor or assignor and without making him a party.<sup>3</sup>

**Application of policy monies.**—A jurisdiction peculiar to the Probate, Divorce and Admiralty jurisdiction in England and to High Courts and District Courts in India when disposing of matrimonial causes may affect the application of monies payable under a policy of life insurance. In England the jurisdiction alluded to is exercised under the Judicature (Consolidation) Act, 1925 c. 49, section 192. In India it is derived from section 40 of the Indian Divorce Act (IV of 1869). The section reads:—

"40. The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity of marriage, and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit:

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children."

The English decisions cited immediately below, while of some utility as a guide to the construction of section 40 of the Indian Divorce Act set out above, have an importance of their own in respect of the application of insurance monies, where the court in India is exercising the matrimonial jurisdiction conferred under the Indian and Colonial Divorce Jurisdiction Act, 1926.<sup>4</sup> Section 1(1) (b) of that statute attracts the British law for the time being in force, so as to place spouses to whom the statute applies, and whose matrimonial differences are being adjudicated upon in India, in the same position as if those differences were being disposed of by the appropriate court in England or Scotland.

<sup>1</sup> Sub-sec. (3). "Time" may thus be equally important.

<sup>2</sup> Sub-sec. (5).

<sup>3</sup> Transference or assignment create no membership of Mutual or Co-operative concerns. (Sec. 99.)

<sup>4</sup> 15 & 17 Geo. V. c. 40.

In *Princep v. Princep*, [1929] P. 225, the Court laid it down that, in deciding whether a settlement comes within the meaning of post-nuptial settlement within the meaning of the English statute above alluded to, the material question is whether the settlement is upon the husband, in the character of husband, or on the wife, in the character of the wife, or upon both, in the character of husband and wife. Mere form is immaterial.

In *Gulbenkian v. Gulbenkian*, [1927] P. 237, the Court treated a life policy effected after marriage by one of the spouses on the life of the spouse effecting it, with a contingent interest of the other spouse in the sum assured, as a post-nuptial settlement; and made an order with reference to the application of the policy monies. In so doing it purported to act under the English statute above alluded to.

In *Woodward v. Woodward*, [1938] All. 95, the Court refused to exercise the discretion given by section 40 of the Indian Divorce Act in favour of the husband, on the ground that he was the guilty party. The husband had taken out three policies upon his own life, but conveying an interest to his wife in those policies contingent upon her surviving him. Harries, J., expressed some doubt as to whether it could be said that Hill, J., in *Gulbenkian v. Gulbenkian*, *supra*, should be taken as having held policies of life insurance capable of being regarded as "settlements" for the purpose of exercising this peculiar jurisdiction. Moreover, he observed that the Court of the Judicial Commissioner of Sind in *Shamdas Gobindram v. Saritribai*, *supra*, was an authority for the proposition that policies such as those in suit were "gifts" in favour of the wife; and if that were so, then, clearly, they could not be within the provisions of section 40 as "settlements". It is submitted, however, that the learned Judge in the Allahabad case would appear to have arrived at this view of the matter, to some extent at least, *per incuriam*. In *Shamdas Gobindram's* case there was a purported assignment to the wife; and Haveliwala, A.J.C., was considering whether an absolute assignment had been made, or only a contingent interest created. In the Allahabad case there was no assignment, but a contract between the insurers and the assured which, it is submitted on the authorities, created a trust in favour of the wife, the benefits of which she would enjoy on the prior death of her husband; and that it would amount to a post-nuptial settlement within the meaning of section 40 of the Indian Divorce Act. It is further submitted that the facts were not such as to make the transaction a "gift" within the meaning of section 122 of the Transfer of Property Act.

**Options.**—To guard against a policy lapsing, by mere oversight on the part of the holder, the Insurance Act, 1938, by section 50, imposes on the insurer the duty of giving the holder notice of any options available to the latter under the contract. This notice must be given before the expiry of three months calculated from the date on which the premium was payable but not paid.

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## CHAPTER VIII

### ACCIDENT AND MISCELLANEOUS INSURANCE

1. Preliminary. 2. Personal accident insurance:—Who is the assured?—Insurable interest—Indemnity or no indemnity—Negotiations prior to contract—Renewal—The risk—Disablement—Commencement and determination of the risk—Altered circumstances—The conditions—Insurance by coupon—Payment of claim—Statutory insurance respecting carriage by air—When such liability may be excluded or limited—Carriage by more than one carrier—Liability under combined carriage—Excepted journeys—Who may enforce the liability—Litigation in respect of injury only or for compensation in respect of delay—Suits in respect of a passenger's death—Limitation—Bar to contracting out of the rules—Statutory insurance under Motor Vehicles Act. 3. Sickness. 4. Public liability insurance:—Preliminary—Insurable interest—Substratum of the contract—Description of the risk—Employers' liability—Liability for servants otherwise than under Workmen's Compensation Act—The doctrine of common employment—Negligence generally. 5. Insurance of premises against other than fire risks. 6. Vehicle insurance. 7. Motor vehicle insurance:—Private cars and private motor cycles—Commercial vehicles—Motor Vehicles Act, 1939—Disability—Reliability—Exceptions:—Wear and tear—War—Other special exceptions—Conditions other than exceptions:—Breach of warranty—Power of cancellation—Prepayment of premium—Right to enforce suit against third party—Making assured part-insurer—Suspension—Compulsory insurance of third-party risks:—Not applicable to certain vehicles—Nature of insurance prescribed—Powers of Provincial Governments—Statutory limitations—The statutory certificate—Third party's rights against insurers—Insolvency, winding up, settlement with creditors—Duty to provide information—Re-insurance—Effect of death on certain causes of action. 8. Negligence. 9. War:—Beginning and end of a war—Insurable interest—Causation—Damages—Workmen's employment.

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#### 1. Preliminary.

Included in the notion of "casualty" insurance, as the same is understood in America, are personal accident, public liability, workmen's compensation, engineering insurance,<sup>1</sup> vehicle insurance, the insurance

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<sup>1</sup> Engineering insurance is, in Great Britain, one of the more specialised branches of the profession. Practically every factory-owner insures his plant, including, of course, his boiler or boilers. The English Factory Act of 1901 compels owners of steam-boilers to submit them to periodical examination by qualified inspectors. Insurers of the plant commonly arrange for this inspection at a relatively cheap rate; for such inspection is of value to themselves in respect of the risks they have undertaken. In India courses for the training of boiler inspectors are now in existence. Factory Acts have for some time past been upon the statute book in this country; and it may safely be said that foreign-owned engineering plant including, of course, electrical machinery, is by its owners regularly insured with companies long experienced in this class of business, though, it would seem

of live-stock and that of crops or of harvested agricultural produce, plate-glass, and many others. To the above list is commonly added business which in Great Britain falls within the category of "Burglary" insurance and Fidelity Guarantee. The law relating to the two last-named classes of insurance business has already been the subject of commentary in Chapter VI of the present treatise.<sup>1</sup> Of the rest not all have yet been sufficiently developed in India to give rise to reported litigation. For instance, in plate-glass insurance<sup>2</sup> hardly any business as yet offers; while live-stock insurance and agricultural Insurance generally represent classes of business which have yet to be properly worked up in this country.<sup>3</sup>

In the foregoing circumstances it is proposed to limit the subject-matter of the present chapter to personal accident insurance, sickness, liability insurance (including workmen's compensation), insurance of premises against risks other than fire, vehicle insurance, and certain insurance contracts (other than those dealt with earlier in the present treatise<sup>4</sup>) which are directly concerned with war; and to treat of these subjects under the general caption Accident and Miscellaneous Insurance.

The categories into which contracts of insurance are divisible have not yet been uniformly established. Thus the student meets with such an expression as "industrial" insurance; and may easily imagine it to represent insurance in respect of specific industries. Yet the phrase has no such meaning. The expression "industrial insurance" has come,

that, in general, the business done is to obtain cover against public liability. Since, however, India, as a whole, is by no means yet industrialised, the volume of such business is necessarily restricted. Engineering policies commonly cover damage to individuals as also to surrounding property consequent on explosion. There can be little doubt that, apart from the general sense of security which insurance offers to factory-owners, efficiency in the conduct of relatively small-scale industrial concerns would be aided in India by the systematic insurance of plant.

<sup>1</sup> See pp. 298-301 and 355-367, respectively, *ante*.

<sup>2</sup> The considerable cost of plate-glass, consequent upon its peculiar properties, including therein its remarkable strength, led, in England, to the rise of a special branch of insurance business to cover all risks incidental to the use of such glass in shop windows and elsewhere. Plate-glass indeed, so rapidly found favour with retail tradesmen throughout Great Britain and the Dominions, as also upon the continent of Europe and the Americas, that by the last quarter of the nineteenth century a very large volume of business was being done. Once such business became established, the same type of insurer began to extend his offers of cover to other descriptions of glass, e.g., sheet, embossed, engraved or stained glass. Thus, not only shop windows but shop signs and transparent advertisements generally are now-a-days included in what may be covered under so-called plate-glass insurance. Similarly the insurance of windows in private houses is often made the subject of such policies, independent of those covering the rest of the structure. But if the insurance is to cover breakage brought about by fire, explosion, earthquake, civil commotion or war or by any kindred peril, special clauses are required and additional premiums are demanded, for, generally speaking, all such classes of risk are excluded from policies designed to cover damage to glass.

<sup>3</sup> The large annual losses to owners of landed property and to the agrarian population in India generally by the ravages of wind, rain, hail and flood could be very largely mitigated by prudent insurance. The volume of business done in America along these lines is enormous. It is, relatively, perhaps, quite as large in the British Dominions and the Crown colonies.

Live stock insurance is general in the British Isles, mostly in respect of such diseases of animals as may involve their compulsory destruction under particular statutes or statutory regulations.

<sup>4</sup> Fire insurance is dealt with in Chapter V, pp. 215-290, *ante*; transit insurance includes marine, (see Chapter IV, pp. 92-214, *ante*) and carriage by inland waterway, road, rail, and air. (See Chapter IV, pp. 185-189, and Chapter VI, pp. 313-353, *ante*.)

for historical reasons peculiar to the development of insurance enterprise in Great Britain, to mean no more than what has been specially designed in that country to meet the requirements of the British working class, most of whose members, irrespective of trade or calling, are paid by the week or the month.<sup>1</sup>

## 2. *Personal Accident Insurance.*

Like most other branches of insurance, personal accident insurance has not as yet been quite so highly developed in India as elsewhere. A considerable volume of business is, however, being done, and evidences of expansion are many.

As in other contracts of insurance, a policy covering personal accidents is voidable for breach of warranty, material misrepresentation, or any other breach of the rule of good faith. To support it as a contract at all, there must on the part of the proposer be an insurable interest in the risk which he requires the insurer to undertake.

**Who is the assured?**—The student may often find himself puzzled by the ambiguous use of the word "assured" in much of the existing literature dealing with this class of insurance business. To speak, as many writers do, of the person an accident to whom is the risk to be covered as the "assured", is misleading in all cases where the insurance is not taken out by the man himself. It is far better surely (as in life insurance) to speak of the person who is to recover under the policy as the person "assured" by it, and of the individual any accident to whom is to be covered, as the "life". This is the commoner and better practice in life insurance, and it is one which it is proposed to follow in the present Chapter. Accident Insurance undertakings usually style the policyholder the *insured*; but that does not get out of the difficulty.

**Insurable interest.**—As in life, so in personal accident insurance, the only question as to insurable interest which can possibly arise concerns policies taken out to cover accidents befalling someone other than the proposer himself.<sup>2</sup> What may be recovered in all third-party accident insurance is therefore the loss, and no more than the loss, sustained to the

<sup>1</sup> The early Friendly Societies had long ago sought to provide insurance benefits for the labourer and the artisan. In time, however, other associations entered upon the same field: some indeed having been definitely formed for the purpose, and styling themselves "Industrial Insurance Companies". The activities of all such companies and of the Friendly Societies in respect of this particular field are in England today largely controlled by the provisions of the Industrial Assurance Act of 1923 and the Industrial Insurance and Friendly Societies Act of 1929. The statutory control is vested in a special functionary known as the Industrial Insurance Commissioner. Whole life and endowment policies, and the offer of many other benefits, are within the schemes worked out by insurance concerns of the kind so controlled by statute. The line which demarcates such so-called industrial insurances from others not specifically designed for the needs of the working classes, is that industrial insurance, as defined, involves the sum assured being less than £1,000, and that the premiums are by the policies payable at intervals of less than two months. In India no such line can be drawn. Insurances are often effected in India by persons who can neither be classed as labourers, artisans, nor as factory hands, who yet take out whole-life or endowment policies for much less than the equivalent in rupees of a thousand pounds, and who are ready and willing to pay that premium at very short intervals, even, indeed, month by month. The method, therefore, which is adopted in England for defining so-called industrial insurance is quite unsuitable to the conditions prevailing in India.

<sup>2</sup> See what is said on this topic under *Life Insurance*, pp. 376-384, *ante*.

assured by the accident which has befallen the life. For in all such third-party insurance the contract is essentially one of indemnity, and consequently no more can be recovered under the policy than what the assured has sustained by way of loss so far as the same has been directly brought about by the peril insured against. The student will perceive, therefore, that although the individual, an accident to whom is the risk to be covered, may sustain a total disablement, the person who has insured against the results to himself of any such accident befalling the life will only recover a relatively small sum; for example, such as would compensate him for the failure in the life to fulfil some professional engagement as an entertainer at the assured's theatre on a particular date or time.

**Indemnity or no indemnity.**—Whether any particular contract of accident insurance is to be construed as one of indemnity or not, depends, as the answers to all such questions do, upon the intention of the parties as expressed in the contract. Where, therefore, what is agreed to be done by the insurers is the payment of a lump sum in a specified event, or to pay a recurrent sum under like conditions or in any other specified eventuality, the contract is not to be classified as one of indemnity. On the other hand the terms may be such that it is compensation, and no more than compensation, which is the object both parties have in view; in which case the sum payable may in particular circumstances be less than the maximum figure for which, in a general sense, the insurers have agreed to be answerable. The foregoing principles are well illustrated and are clearly stated in *Blaschek v. Russell*, [1916] 33 T.L.R. 51.

In instances where the contract is one of indemnity the principle of subrogation<sup>1</sup> applies. It is otherwise where the nature of the contract is not one of indemnity. In every such case the fact that he is insured against accident either by a policy taken out by himself or by someone else on his behalf, in no way affects the injured man's right to proceed against the person who may be considered in law accountable for the accident. In like manner if the accident shall have ended fatally, the insured's dependents may maintain their action under the Fatal Accidents Act, unimpeded by anything claimable under the policy. In every such case, then, the policy-moneys as well as any damages recoverable in an action of tort, enure for the assured and/or his dependents, or his heirs or assigns as the case may be, and the insurers can make no claim by virtue of the doctrine of subrogation. But in India it would seem that, for reasons no longer obtaining in England, the *factum* of an insurance policy under which the plaintiff might recover something may be taken into consideration in assessing damages.<sup>2</sup>

**Negotiations prior to contract.**—In practice, insurers require almost as careful a review of the life's personal history, of his state of health at the date of the relative application, and of his occupation and habits, as is considered necessary in the case of life insurance properly so-called. But it is said that many insurers in the case of ordinary personal accident, and personal accident and specific diseases policies, are often content to dispense with a medical examination. If the insurance is to be against personal accidents to the applicant himself,

<sup>1</sup> See the commentary in Chapter III, pp 71-77, *ante*.

<sup>2</sup> See the commentary in Chapter II, pp. 44-46, *ante*. And as to the effect of war risks in assessing such damages, see the present Chapter, p. 500, *post*.

it is the latter to whom the majority of personal questions will be addressed. But if the insurance is to be effected against accidents to one or more persons other than the proposer, and if the answers to any such questions, whether given by the proposer or by the life, are expressed as warranties, or, which has the same effect, where the answers are made the basis of the contract between the parties, any untrue statement made in answer to a question will vitiate the contract. One of the most dangerous and difficult questions commonly included in questionnaires to be answered by the proposer or the life, is whether there are any circumstances in or connected with the latter's occupation, health, pursuits, or habits which render him peculiarly liable to accident or disease. (See *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; *Cruikshank v. Northern Accident Insurance Co.*, [1895] 23 R. (Ct. of Sess.) 147; and *Australian Widow's Fund Life, etc. v. National Mutual Life Association of Australasia*, [1914] A.C. 634.)

As in other contracts of insurance where the insurers have themselves the means of finding out the information they require and have used that machinery, neither the applicant nor the life are bound to disclose what they may reasonably imagine the insurers to have found out by the ordinary means at their command. If the duty of ascertaining the facts has been delegated in the ordinary course of an insurance company's business to some subordinate official, the company will, in law, be bound by his knowledge, for the same reasons that it is affected by the knowledge of its board of directors (*Evans v. Employers Mutual Insurance Association*, [1936] 1 K.B. 505, 515.) The Court of Appeal in that case reversed the decision of the trial judge, who had held that an agent's knowledge must come to the minds of the persons whose duty it was to act upon it.<sup>1</sup>

**Renewal.**—Policies of personal accident are personal contracts and are usually strictly governed by time. There is thus no right to enforce upon an insurer any renewal of a contract which in terms has run out. In the past, ambiguously-worded policies have led to difficulties in this respect, especially in regard to life insurance properly so-called.<sup>2</sup> Modern policies of accident insurance protect the insurer against claims arising after the policy has run its course; unless it shall in the meantime have been renewed in accordance with stipulations appearing on the face of the instrument. It follows from this condition of things that a renewed policy is usually to be construed as a fresh contract; and in consequence, any altered circumstance, though the same need not have been communicated during the period of the previous contract, becomes eminently communicable under the Rule of Good Faith, if the applicant desires to renew the insurance. A breach of the rule of good faith in this regard will accordingly vitiate any renewed or other form of fresh policy upon the same life.

**The risk.**—The fact that the kind of insurance business now under discussion concerns events popularly spoken of as "accidents" has led more than one text-book writer into attempting to define what constitutes an "accident" for the purpose of this class of contract.<sup>3</sup> "It is difficult" said Cockburn, C.J., in *Sinclair v. Maritime Passengers'*

<sup>1</sup> But see pp. 90, 238, 388, 390, 436, *ante*.

<sup>2</sup> See the discussion in Chapter VII, pp. 429–433, *ante*.

<sup>3</sup> See the meaning suggested at p. 218, *ante*.

*Insurance Co.*, [1861] 3 E. & E. 478, "to define 'accident' in a policy of this nature so as to draw with perfect accuracy a boundary line between injury or death from accident or from natural causes such as shall be of universal application". One may be permitted respectfully to lament that the learned Chief Justice did not stop there. For the problem in every instance is not to reconcile the popular with the philosophical conception of "chance", or the corresponding notions of "accident" to which the respective concepts of "chance" contribute, but rather, in each case as it arises, to determine whether the event relied upon by the person making a claim against the insurer does or does not come within the risks which the parties contemplated. It is thus, surely, an idle quest to endeavour to find by deduction or otherwise some constant notion of the word "accident" as informing the relative case-law. Indeed the more patiently and carefully the authorities be studied, the more clearly does the truth of Lord Halsbury's dictum emerge, namely, that a judgment, after all, is only an authority for what it decides. And what the several judgments to which reference is made in the present context in every case are seen to decide is never more than an answer to the question: "Is this so-called accident a risk of the kind which the parties to the policy sued upon intended that policy to cover?" Such a question can only be answered with reference to the language employed in the relative instrument, read, if necessary, with anything expressly or by necessary implication attracted. In short, the solution of every such problem resolves itself into a matter of construction.

Unhappily, in *Sinclair's case*, *supra*, the Chief Justice in delivering the judgment of the Court, after expressing the difficulty alluded to, went on as follows: "At the same time we think we may safely assume that in the term 'accident' as so used, some violence, casualty or *ris major* is necessarily involved." In the particular instance the relative instrument had promised compensation "*in the event of . . . any personal injury during the said intended voyage from or by reason or in consequence of any accident whatsoever.*"<sup>1</sup> The assured was the master of a ship who while doing his ordinary duty fell a victim to what was

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<sup>1</sup> The popular notion of an accident, as something to be distinguished from an event brought about by natural causes, will, on analysis, be found to mean no more than an event the natural causes of which are either, in a popular sense, unknown, or to which at any rate, some element in the chain of causation is thought of as something whose intervention could not reasonably have been predicted. To the man of science or the philosopher every event is the result of natural causes. Thus, what may appear unexpected and accidental to one man will appear to have been eminently predictable to another—predictable indeed upon the basis of the self same data when, however, the same are reviewed against a background of more general or more special knowledge. Lord Sumner put the popular view of what casualty insurance seeks to provide for when he said "It covers a risk, not a certainty". (*British & Foreign Marine Insurance Co. v. Gaunt*, [1921] 2 A.C. 41, at p. 57.) So long as the event ultimately relied upon is seen to be within the category of "risks", such as the parties contemplated when they entered into the relative contract of insurance, it is immaterial whether to better-informed opinion or in the light of better subsequent knowledge what occurred was, scientifically speaking, bound to happen. As used in the English Workmen's Compensation Act, 1870, section 1, Lord Macnaghton, in *Fenton v. Thorley*, [1903] A.C. 448, construed the word in its "popular and ordinary sense" as denoting "an unlooked-for mishap or an untoward event which is not expected or designed". In the same case, however, it was pointed out by Lord Lindley that the "statute did not everywhere use the word in the same sense and that sometimes it was used of the particular injury, at others of the character of the event which occasioned the injury".

diagnosed as "sunstroke"; and the Court held that such a death was not an "accident" within the meaning of the policy.

The following decisions sufficiently illustrate the statement made above, that the judicial mind is seen always as applying itself to the words of the contract sued upon. In *Fitton v. Accidental Death Insurance Co.*, [1864] 17 C.B. (N.S.) 122, the risks assumed included "all forms of cuts, stabs, etc., when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death". Death or disability "arising from . . . hernia" solely or jointly contributing to the result, was excluded. The insured was subjected to external violence of an accidental nature. This brought on hernia, and death ensued. The insurers were held liable. Four years later a policy in almost identical language fell to be construed (*Smith v. Accident Insurance Co.*, [1870] 5 Exch. 302), in which the exception included "erysipelas". The assured accidentally cut his foot and some five days later *erysipelas* supervened, and of that he died. The Court considered *Fitton's* case; but regarded it as to be distinguished on the findings of fact. The insurers were held protected. The distinction seems to lie in the view that in *Fitton's* case the hernia was treated as merely the mechanical way in which, by a violent accident, death had been brought about. And thus the accident could be held to be the "sole cause" of death, whereas in *Smith's* case *erysipelas* was treated as representing a diseased state to which the accident was but one of the predisposing influences. The same type of policy was considered in 1885 in *Cawley v. National Employers Accident and General Assurance, etc.*, 1 T.L.R. 255, where a fall caused a gall stone to shift its position and to block the gall duct. The words of exclusion used in the policy were "death or disablement arising from or accelerated or promoted by any disease or bodily infirmity" . . . The presence of a gall stone at all represents in itself a diseased condition of the body. In *Scarr v. General Accident, etc.*, [1905] 1 K.B. 387 (*sub nomine re Scarr & General Accident, etc.*), the risk was described as "bodily injury caused by violent, accidental, external and visible means",<sup>1</sup> conditional on the injury being "the sole and immediate cause of the death". The life insured was that of a servant who in attempting to eject someone from his master's premises over-exerted himself; and the result of so doing was that his already weak heart gave way under the strain, and death ensued. . Such a death was held not one brought about by "accidental means", within the meaning of the policy.

For other examples the reader is referred to *Isitt v. Railway Passengers Assurance, etc.*, [1889] 22 Q.B.D. 504 ("death from the effects of injury caused by accident"); *Mardorf v. Accident Insurance Co.*, [1903] 1 K.B. 584 ("intervening cause" excluded); *Cole v. Accident Insurance Co.*, [1889] 5 T.L.R. 736, C.A. (poison accidentally taken). This decision was followed in *Brown's* claim in *Re United London and Scottish Insurance*, [1915] 2 Ch. 167. The cases of *Trew v. Railway Passengers Assurance, etc.*, [1861] 6 H. & N. 839; *Reynolds v. Accidental Insurance Co.*, [1870] 22 L.T. 820; and *Winspear v. Accident Insurance Co.*, [1880] 6 Q.B.D. 42, are all examples of drowning, in which, though there were other contributing causes, the circumstances brought the event within the notion of an "accident" as contemplated in the relative policy. In *Pugh v. London, Brighton and South Coast Ry. Co.*, [1896] 2 Q.B. 248, the plaintiff was shown to have sustained a nervous shock in his

<sup>1</sup> See the discussion of this particular phrase at pp. 464, 465, *post*.

endeavours to avert an accident; and that he never sufficiently recovered from it to be able to resume his duties as a railway servant. What had happened to him was held to be an "accident" within the meaning of the policy.

The element of time may sometimes be of great importance. Thus, in a Canadian case, where the policy offered an indemnity against being "*at once and continuously*" disabled from working, the insured person returned to work after the accident; but the original injury continued, and by its effects he was subsequently disabled. The insurers were held not liable. (*Mathews v. Continental Casualty Company*, [1932] 3 W.W.R. 289.)

The case of *Fidelity and Casualty Company of New York v. Mitchell*, [1917] A.C. 592 (P.C.), is instructive: the policy covering disablement. The assured was an "ear, throat and nose" specialist, was involved in a railway accident and so injured his wrist as thereafter to be unable to perform any delicate operation. The decision largely turns upon the construction of a certain well-known type of policy now, as then, popular with many American and Canadian concerns. The policy provided double disability benefits. The assured succeeded in the action.

In *Cole v. Accident Insurance Co.*, *supra*, some poison had been taken in mistake for medicine. Though the mistake indicated great carelessness, the event was held within the policy. This case illustrates the principle that, unless specially excluded, events brought about by negligence whether on the part of the life concerned or of third parties will be regarded as essentially "accidental" within the meaning of such policies. (See, also, *Cornish v. Accident Insurance Co.*, [1889] 23 Q.B.D. 453, C.A., a case of negligent crossing of a railway line.) The fact that the act is more than common negligence, in so much as to be criminal, makes no difference. Deaths and other injuries resulting from the sinking of the *Lusitania* by the Germans during the war of 1914-18 were within this class of event. (See *Lells v. Excess Insurance Co.*, [1916] 32 T.L.R. 361.)

Where cover was provided in respect of "any one accident or occurrence" up to a liability of £300, it was held on a claim for more than this sum on the ground that there were two accidents arising out of the same mishap,—in the sense that two persons were injured and considered themselves entitled to separate compensation,—that although there were undoubtedly two "accidents", there was but one "occurrence" within the meaning of the policy, and that the limit of £300 applied. (*Allen v. London Guarantee & Accident, etc.*, [1912] 28 T.L.R. 254.)

Much business falling within the category of casualty insurance concerns itself with liabilities to which employers are exposed under the Workmen's Compensation Acts. Such insurances sometimes attract the concept of an "accident" within the meaning of that particular statute. Here, again, it is no abstract or philosophical definition which is attracted, but just what the Courts hold the particular statute to mean when it speaks of an "accident" or uses the adjective "accidental". In a word, it is a pure question of construction.

Risk is often sought to be limited to injuries caused by "*violent, external and visible means*". Each of the words found in the above phrase has been the subject of judicial interpretation. Lord Esher,

<sup>1</sup> A phrase which has been common in personal accident policies for a long time past, and which has been viewed with judicial disfavour in *Re United London & Scottish Insurance Co.*, *Brown's* claim, p. 463, *ante*.

M.R., in *Hamlyn v. Crown Accidental Insurance Co.*, [1893] 1 Q.B. 750, 752, held the word "violent" to express the opposite of "without any violence at all". Thus some kind of force is essential. The facts of that case may well seem to have brought it very close to the line; for the assured had only stooped to pick up a child's marble, and in so doing had somehow contrived to dislocate the cartilage of his knee. The element of "extra exertion" which he was supposed to have displayed turned the judicial scale in his favour. A gasping for breath under water resulting in death by drowning, or when inhaling a noxious gas, and thus leading to suffocation, has been held an act "violent" within the meaning of this phrase. (See *Trew's* and *Reynold's* cases, and *Brown's* claim, *supra*.)

The word "external" in the phrase under discussion, has, of course, reference to the cause and not to the injury. The injury may be set up anywhere inside or outside the human structure. But that which brings the injury into existence must be something arising outside the bodily frame. Even though the event may depend in the chain of causation upon such a predisposing influence as an epileptic fit, the accident will be caused by an "external" circumstance within the meaning of this phrase if the epileptic, consequent upon the seizure, manages to fall so as to be run over by a railway train. (*Lawrence v. Accidental Insurance Co.*, [1881] 7 Q.B.D. 216.)

The word "visible" was interpreted in *Hamlyn's* case, *supra*, where it was held that any "external" cause is a "visible" cause. Here, again, it is the cause which is referred to, and not the resulting injury. Thus in *Burridge & Son v. Haines & Sons*, [1918] 87 L.J. K.B. 641,—where the policy covered a horse and not a person,—the insured animal, when hauling a loaded van, bolted and somehow fell into a ditch by the side of the road, where one of the shafts of the van so pressed upon its wind-pipe as to bring about death by suffocation. The animal's skin was quite unmarked. But the circumstances were held to constitute a "visible" cause within the meaning of the policy.

**Disablement.**—Modern insurance in the nature of personal accident insurance often concerns itself with the provision of money payments in their nature compensatory for what is termed "disablement". Disablement by reason of accidental injury is, for the purpose of such contracts, commonly treated as falling into one or two of the following four categories: (a) partial, (b) total, (c) temporary, and (d) permanent.<sup>1</sup> To be so classified, disablement must always bear some relation to the injured person's mode of earning his bread. A phrase common in that regard is "usual business or occupation" a phrase judicially construed to include the whole scope and compass of the assured's mode of getting his livelihood. (*Hooper v. Accidental Death Insurance Co.*, [1860] 5 H. & N. 546, 556.) The last-named case illustrates how an injury may produce first a total temporary disablement, to be succeeded by a partial permanent one, e.g., a dancing master whose sprained ankle prevented him for a time from demonstrating his art at all, leaving him in fact never so efficient again. It was pointed out that had he been a mathematical

<sup>1</sup> "Partial disablement" is defined also in sec. 2, cl. (g) of the Workmen's Compensation Act (VIII of 1923); but such definition is for the purposes of that statute, and has no reference to or effect upon the categories of disablement to be found in insurance policies. Workmen's compensation insurance is dealt with at pp. 478, 479, 500, *post*.

master the disablement would have been slight, and at worst but temporary. In the same case the opinion was expressed that the plaintiff, who was a solicitor, confined to his room with a sprained ankle, was wholly disabled from carrying on his usual business or occupation whilst so confined: the ratio of the decision being that even if he were able, with the aid of clerks, to transact a certain amount of business, he was wholly prevented from carrying on his business and occupation "in his usual manner".

The distinction between partial and total disablement for the performance of the work or duty incidental to a particular occupation is, in reality, a question of fact, based upon a review of evidence which must necessarily be largely technical. There is in most cases less serious difference of opinion as to the extent of an injury, than as to whether it should be regarded as temporary or permanent. In the great majority of cases the latter question, in practice, has to be solved by competent medical opinion; since it is open to neither party to make Time the arbiter. Thus it is that the case-law relating to claims in respect of disablement is chiefly illustrative of how the Courts have dealt with the relative evidence.

There have been decisions in the Dominions and in America which have closely followed the line of reasoning adopted in *Hooper's case*, *supra*: in others the view of total disablement has not been pushed so far. The cases of eye affection are instructive. For instance, it does not support a claim on a policy covering "total and permanent loss of sight" to show merely that the eyes are so affected that the assured could no longer follow his previous occupation. (*Copeland v. Locomotive Engineers' Insurance, etc.*, [1910] 16 O.W.R. 739.) It has been held by a Dominion Court that there is, in fact, no "total loss of sight" if the assured can, by his eyes, distinguish daylight from darkness. (*MacDonald v. Mutual Life & Citizens Assurance*, [1910] 29 N.Z.L.R. 479, 1073.) The facts in *Bawden v. London, Edinburgh & Glasgow Assurance*, [1892] 2 Q.B. 534—an eye-sight case—were peculiar. An agent had accepted a one-eyed man for an insurance which covered "loss of sight in both eyes". The knowledge that the assured had but the use of one eye, when the contract was made, was imputed to the insurers. Accordingly, when, by an accident, the assured lost the sight of the other eye, the Court held that he was entitled to compensation not (as it was contended for the insurers) as for the loss of sight in one eye, but on the footing of loss of sight in both eyes; since the accident covered by the policy had had the effect of rendering the assured totally blind.

There is judicial authority for the proposition that the disablement need not supervene at once. It is within the policy if the disablement, whensoever it arises, has been caused by the accident relied upon<sup>1</sup>; and unless the policy is to be construed otherwise, the rule of *proxima non remota causa* applies as much to contracts of the kind we are now considering, as in any other form of personal accident insurance. In the early case of *Theobald v. Railway Passengers Assurance, etc.*, [1854] 10 Exch. 45, the assured was permitted to recover compensation for pain and suffering and necessary expenses consequent upon the accident, though the policy expressed no particular sum except in the case of death. But he was not permitted to recover compensation for loss of time or business, it being held that, on a true construction of the

<sup>1</sup> *Shera v. Ocean Accident & Guaranty, etc.*, [1900] 32 O.R. 411; *Clanton v. Travellers' Insurance Co. of Hartford*, [1917] 52 Q.R.B.C. 239.

particular policy, that would be to give him compensation for "consequential loss", and no such loss was within the policy.

**Commencement and determination of the risk.**—What has been said elsewhere in this treatise concerning the effect of cover-notes issued before the execution of a formal policy, applies in principle to *interim* protection in respect of personal accidents.<sup>1</sup> The existence of a cover-note with such an aim renders the subsequent policy retrospective in effect. (*Roberts v. Security Co.*, [1897] 1 Q.B. 111.) Generally speaking, the instrument states with precision not merely the date, but the hour, when the risks covered will begin to run. As this date and all that it connotes depend upon the issue of the instrument itself, it seems that if an event which would otherwise give rise to a claim occurs before the issue of the policy, and the issue takes place after the period named as the commencement of the risk, even an ante-dating of the date of issue will not have the effect of making it cover the antecedent loss. (*Allie-Chalmers Co. v. Maryland Fidelity & Deposit Co.*, [1916] 114 L.T. 433.)

Where there are conditions precedent to the attachment of the risk, non-fulfilment of any such condition will override the effect of the loss occurring after the date of commencement as shown in the instrument.

In accident policies, limited in their scope to specified hazards such as are incidental to a voyage or voyages, or issued in connection with particular journeys by rail or air, the risk may not begin to run until the commencement of the named adventure, whenever that may be. Thus, where an aviation policy provided that the risk was to run "*from the date and time of the first flight*" those material words were construed so as to make the risk begin so soon as the pilot attempted to rise, and thus to cover an accident occurring before the machine had in fact left the ground. (*Dunn v. Campbell*, [1920] 4 Ll.L.R. 36.)

If the contract be legally determined, though before the date or other circumstance originally contemplated by the parties, the liability assumed by the insurers ceases as from the date of such determination. Some policies expressly provide a method of determining the contract by specific notice. In other cases the rights of the parties cease by efflux of time. The same result is arrived at where the insurers, being a company, go into liquidation. (*Re Life & Health Assurance, etc.*, *Berry's claim*, [1913] 2 Ch. 137n; and *Re Law Car & General Insurance Corporation*, [1913] 2 Ch. 103, 126.) But the assured may prove in the liquidation, not as a secured creditor, but upon the ground of having a contingent claim; and this is so even where he has brought an action on the policy. (*Harrison v. Mortgage Insurance Corporation*, [1893] 10 T.L.R. 141.) In other cases, again, the assured loses his rights either by failure to fulfil a condition precedent, or by breach of some other essential term. Moreover, a policy, like all other contracts, may, in a proper case, be cancelled by an order of the Court. And, lastly, where the insurer pays over the full sum assured, he thereby discharges himself from further liability unless, by the operation of an automatic reinstatement clause, that liability is re-created *in futuro*, subject, of course, to the payment of a premium, or an additional premium, as the case may be.

**Altered circumstances.**—The fact of circumstances affecting the risk having undergone some alteration during the stage of negotiations

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<sup>1</sup> See Chapter III. pp. 79 and 80; Chapter IV. pp. 116-121; Chapter V. pp. 233-235; Chapter VII. p. 411.

or indeed at any time prior to the policy having issued, falls within the Rule of Good Faith and must be disclosed. Not so where the circumstances have altered after the risks have been accepted, save where a policy has run its course or lapsed; for a renewed or revived policy is a fresh contract. Nor is the life in any way fettered in his pursuits or habits by reason of having taken out a personal accident policy unless, of course, the terms of the instrument itself expressly exclude accidents arising from particular occupations or pursuits from the risks undertaken. In such a state of things he takes the risk of failing in any claim against the insurers under a policy thus limited in scope who in fact exposes himself to damages incidental to the excepted perils.

**The conditions.**—In this branch of insurance business there is a growing tendency to adopt more or less standard forms of policy. Even so, in matters of form, there are still a good many variants. In the commoner forms of modern policy those conditions which are in the nature of Exceptions are framed as provisos to the promissory words descriptive of the risks to be covered: all other conditions being printed elsewhere, usually under the specific caption "conditions".<sup>1</sup>

As to Exceptions, policies covering personal accidents vary so much in respect of the risks entertained that it were useless to attempt to enumerate or even classify the excepted perils. It must suffice to say that in the realm of personal accident insurance, an out and out "all-risks" policy is hardly a business proposition. It follows, therefore, that for practical purposes the relative policy will always contain some exceptions relegating the assured to separate insurance, if he desires to be covered in respect of the perils otherwise excluded. The commoner general exceptions referred to are war or warlike operations, self-inflicted injuries, where the same are premeditated, death by the assured's own hand, and certain notoriously dangerous occupations and pursuits.

A suicide clause in a personal accident policy is often framed in a form analogous to what is commonly used with similar intent in ordinary whole-life or endowment policies.<sup>2</sup> The student must remember that where suicide is made a specific Exception, and the insurer desires to avail himself of it in an action on the policy, the *onus* will be upon him to establish not merely that the life insured died by his own hand, but that such death was a suicide as the same is understood in the relative law of crime attracted. For there is a legal presumption against suicide, which the insurer would thus become under the necessity of rebutting. (*Harvey v. Ocean Accident and Guarantee Corporation*, [1906] 2 I.R. 1; *Moretti v. Dominion of Canada Guarantee & Accident, etc.*, [1923] 3 W.W.R. 1; *London Life Assurance v. Lang Shirt Co.'s Trustee*, [1929] Can. S.C.R. 117.) In an early case in England (*Clift v. Schwabe*, [1846] 3 C.B. 437) the opinion had been expressed that every act of self-destruction was, in common language, a suicide; but the dictum (which was *obiter*) is sufficiently qualified by the words "*provided it be the intentional act of a party knowing the probable consequence of what he is about*", not to run counter to the doctrines generally acceptable to the British and American Courts of today.

In the discussion of particular exceptions, as in the discussion of words used to describe the risk, nothing is more dangerous than attempt-

<sup>1</sup> See what is said earlier in this treatise as to the nature and effect of "conditions": in particular Chapter II, p. 41, *ante*.

<sup>2</sup> See the discussion (of suicide clauses) in the previous Chapter of this treatise at pp. 422-429, *ante*.

ing to deduce legal principles from decisions going no further than the interpretation of a word or a phrase in the particular context. The scope of the present treatise does not permit of any lengthy description of such interpretations. One or two examples only must suffice.

An American Court in 1890 (*Cotten v. Fidelity and Casualty Co.*, 41 Fed. Rep. 506) had decided that there was no breach of a warranty on the part of an applicant for an accident policy that he was "not subject to any bodily infirmity" where the facts disclosed that he was what is sometimes called "near-sighted". It is submitted that it must surely be a question of degree whether any particular defect of vision will amount to a bodily infirmity within the meaning of such a warranty. For the purposes of estimating a risk to accident, certain classes and degrees of defective vision must rank as infirmities the concealment of which may materially affect an insurer's decision either to accept the risk at all, or to fix the premium at the sum stated in the policy.

Another not uncommon Exception to be found in accident policies concerns what may be compendiously referred to as "voluntary exposure" to risk. One American Court construed an Exception as to "*voluntary exposure to unnecessary danger, hazard or perilous adventure*" to mean "wanton or grossly imprudent exposure". (*Manufacturers, etc. v. Dorgan*, [1893] 58 Fed. Rep. 945.) But, here again, the student must guard himself against erecting a principle of universal application upon this or any other decision of like nature. For example, the word "unnecessary" in such a context as is alluded to above may well give rise to very nice questions. Take, as an instance, the facts which emerged in a recent action in England brought by the dependants of a man—who had met his death by burning—for compensation under what is known as "Lord Campbell's Act"<sup>1</sup>. The deceased was at the material time acting as the night watchman of certain business premises which caught fire under circumstances attributed by the judgment of the Court to gross negligence on the part of the defendants in the action. Having noticed the fire in its early stages, the deceased first gave the alarm, and then himself ran back into the burning building for the purpose (as was found, as of fact) of doing what he could towards extinguishing the fire. While so acting in what was found to be the performance of a natural duty to his master, the man was burnt to death. For the defendant it was contended that whatever might be the original circumstances bringing about the fire, the deceased himself, so far as his own injuries and death were concerned, had brought about a *novus actus interveniens*<sup>2</sup> and, that, in any event, the principle enshrined in the maxim *volenti non fit injuria*<sup>3</sup> applied; and, consequently, that the defendant was not in law liable for the disaster which overwhelmed the deceased and his dependants. It was held, however, that neither doctrine had any application where, as there, the injured person had acted in the performance of an express or implied obligation arising out of a contract of master and servant; and the plaintiffs succeeded. (*D'urso v. Sanson*, [1939] 4 All E.R. 26.) It has yet to be decided whether like reasoning may not apply in a contract of accident insurance where the insurers rely upon the exclusion of risks attendant upon "*voluntary exposure to unnecessary danger, hazard, etc.*".

<sup>1</sup> See the short commentary on this statute and the corresponding legislation in India as affecting insurance in Chapter II, pp. 44 and 45, *ante*.

<sup>2</sup> "A new event intervening."

<sup>3</sup> "What a man consents to [undergo] makes no injury [in a legal sense]."

Adverting to those conditions which are not in the nature of Exceptions to the risk undertaken, the following are the commoner subjects to which such conditions have reference: (1) Notice in writing of any change in name, residence or occupation. (2) Proposal and Declaration to be treated as basis of the contract. (3) Engagement in an occupation not specified in the proposal (save under certain specified circumstances) without the insurer's permission and the payment of such additional premium (if any) as may be demanded. (4) Fraudulent obtainment of benefit. (5) While in receipt of disablement allowance, wilful exposure to risk, or wilfully engaging in anything which may retard recovery or induce other ailments. (6) Duty, when tendering premium for renewal, to disclose any new disease, physical defect, or infirmity, to which the life has become a victim, or of which he has become aware since the payment of the previous premium. (7) Form or manner of validating special or other endorsements. (8) Receipts by or on behalf of assured a sufficient discharge. (9) Reservation by the insurer in respect of any trust, charge, lien, assignment or other dealing with or relating to the policy. (10) Notice by the assured of his being or becoming a member or holding or acquiring a policy of any friendly, accident, society or company. (11) Stipulation as to notice of the accident—usually within a specified time limit. (12) Stipulation concerning a notice of claim. (13) Stipulation as to a full Report of the accident, as also "a like Report and Certificate from his (the life's) medical attendant"<sup>1</sup> (14) Stipulations with regard to the examination of the assured by the insurer's medical advisers, and in the case of assured's death, concerning a *post-mortem* examination at the insurer's expense. (15) Days of grace. (16) Form of receipt, if the same is to bind the insurer. (17) Arbitration.

**Insurance by coupon.**—Commercial ingenuity has devised a means of offering insurance to the members of the public at large who fulfil the conditions of the offer conveyed by what has come to be styled a "coupon". The commonest way of making such an offer is by means of publishing a written promise, subject to specified advertised conditions, to any purchaser of some well-known Diary. But similar advertised benefits are often offered to purchasers of other articles. It is purely a question of construing the relative coupon to determine whether (as in *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, C.A.) the insurance is effected by the mere act of purchase, or whether (as in *General Accident, etc. v. Robertson*, [1909] A.C. 404) something more has to be done by the purchaser of the article to entitle him to enjoy the benefits of the offer. In the last-named case the insurance was to continue in force for twelve months after the coupon (to be filled up by the purchaser of the diary) should have been registered by the insurers responsible for the offer. The insurers neglected to register the coupon which they had received; and it was held that in such circumstances the benefits of the insurance had not at the date of the action been in any way limited by time. In *Shanks v. Sun Life, etc.*, [1896] 4 Sc. L.T. 66, it was held to be within

<sup>1</sup> Concerning the last-mentioned stipulation it was decided so far back as *Worsley v. Wood*, [1796] 6 T.R. 710, 718, that where a condition cannot be fulfilled the same is a nullity; for the law does not compel the performance of an impossibility. It was upon this principle that it was held in *Putton v. Employers' Liability Assurance Corporation*, [1887] 20 L.R.Ir. 93, 99, that where, in a personal accident policy, there was a condition requiring a report to be furnished "by the assured's medical attendant", the fact that the assured had no medical attendant exonerated him from performing the term.

the particular offer for the holder of the coupon to have been classified as a regular subscriber to the newspaper in which it had appeared, even though he might not have paid for the particular issue from which he had extracted the coupon ultimately relied upon. All such insurances, however, depend for their validity as contracts upon when, if at all, the offer made has in fact been accepted, either expressly or by necessary implication. Upon the authority of *Gibbons v. Proctor*, [1891] 64 L.T. 594, and *Fitch v. Snedaker*, [1868] 38 N.Y. 248, one text-book writer regards it as doubtful whether an offer to insure all purchasers of a paper is to be regarded as accepted by one who, having bought it, remained in ignorance of the offer. It is submitted, however, that in the law relating to contracts in India there would in such circumstances be no acceptance of the offer, and so no contract.

**Payment of claim.**—As already observed, the entertainment of a claim at all is usually made dependent upon the notices and certificates touching the accident, and the claim having been furnished in the requisite form and by the time prescribed in the policy. In "coupon insurance", payment in the case of a fatal accident is usually made to a specified person. Claimants under newspaper coupons are usually bound, under a special reservation, by the editor's adjudication upon conflicting claims, if any, and generally upon the question of who is the next of kin. (*Law v. George Newnes, Ltd.*, [1894] 21 R. (Ct. of Sess.) 1027; *Da Costa v. Prudential Assurance*, [1918] 120 L.T. 353.)

**Statutory insurance respecting Carriage by Air.**—Much earlier in this treatise a brief reference was made to circumstances under which there might be a duty to insure imposed by law.<sup>1</sup> It is obvious that where a statute compels a person to accept liability for the death of, or for injury to, someone to whom he stands in a contractual relationship, and in respect of that responsibility to pay compensation, it is not to misuse language if it be said that one so conditioned has *ipso facto* become an insurer to the extent indicated in the statute. Such is the position created, for example, by certain sections in the Indian Carriage by Air Act (XX of 1934) some of the provisions of which have been the subject of commentary in an earlier chapter of this treatise.<sup>2</sup>

**The Air-carrier's liability.**—The relative provisions are to be found expressed in a number of rules scheduled to the Act.<sup>3</sup> The particular liability referred to is imposed by Rule 17 of the First Schedule by which the air carrier is made liable for damage sustained in the event of the death or wounding of, or any other bodily injury sustained by, a passenger, as a result of an accident having taken place actually on board an aircraft or in the course of any of the operations of embarking or disembarking passengers. He is also liable for damage caused to passengers by reason of delay.

**When such liability may be excluded or limited.**—By Rule 25 the carrier can neither exclude nor limit his liability where the damage is caused either by his own wilful misconduct or by such default on his own part as in the opinion of the Court, on contest, is equivalent to

<sup>1</sup> I.e., in respect of property. (See Chapter V, pp. 227, 228, *ante*, under the caption *Insurable Interest*.)

<sup>2</sup> See Chapter VI, pp. 329-340, *ante*.

<sup>3</sup> The text of the Act and of the two Schedules thereto will be found in Appendix VI, pp. cxi-cxlvii, *post*.

willful misconduct. Nor can he limit or exclude it, if the damage be caused by his agent acting within the scope of the latter's employment.

In any event his liability is limited to 125,000 francs. It must not exceed this figure, though the damages awarded may take the form of periodical payments, unless by special contract the parties shall have agreed to a higher limit of liability. The relative rule in this regard is Rule 22. But by Rule 23 it is provided that any agreement to fix the limit below the statutory figure is, to that extent, void. By section 2 (5) of the Act the sum awarded in francs is to be converted into rupees at the rate of exchange prevailing on the date on which the amount of damages is ascertained by the court.

By Rule 20 (1) the carrier is relieved of liability if he proves that he himself and his agents have taken all necessary measures to avoid damage or, alternatively, that it was in fact impossible for him or them to take such measures.

If the passenger causes the damage, or contributes thereto by his own negligence, the court has a discretion wholly or partly to exonerate the carrier.

*Carriage by more than one carrier.*—Where the carriage is performed by several successive air-carriers, such carriage is deemed for the purpose of the Statutory Rules to be one undivided carriage so long as it has been regarded by the parties as a single operation, irrespective of whether it has been agreed upon under the form of one single contract or of a series of contracts.

Carriage, as contemplated in the next preceding paragraph, subjects each successive carrier, as one of the contracting parties, to a liability in respect of that part of the carriage which is performed under his supervision, unless by express agreement the first carrier has assumed liability for himself and all successive carriers contributing to the whole journey.

*Liability under combined carriage.*—Where the journey is performed partly by air and partly by some other mode of carriage, the Statutory Rules as to air carriage apply only to so much of the journey as is in fact performed by air, and then only if the journey by the latter means falls within the terms of Rule 1 of the Statutory Rules<sup>1</sup>.

*Excepted journeys.*—The Statutory Rules and the liabilities imposed by them have no application to international carriage by air when the same is performed by way of experimental trial undertaken by air navigation authorities or undertakings with the object of ultimately establishing a regular line of air navigation. Moreover, the Rules do not apply to carriage by air which is performed in extraordinary circumstances, outside the normal scope of an air-carrier's business. The foregoing provisions as to experimental trials, etc., are to be found in Rule 34.

*Who may enforce the liability.*—By Rule 1 of the Second Schedule the liability for the death of a passenger is enforceable for the benefit of such of the members of the deceased's family as have sustained damage by reason of his death. For the purpose of the benefits conferred by these Rules, "member of a family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother, half-sister, child, step-child and grand-child. Moreover, illegitimate persons are to be treated for the purpose of these benefits as legitimate; and any adopted person is to be treated as if he were the natural child of his adopters.

<sup>1</sup> For the terms of Rule 1, see Appendix VI, pp. cxi-cxli, post.

By Rule 2 of the same Schedule only one action in respect of the death of any one passenger may be brought in British India. Every such action, by whomsoever brought, is, according to the Rule, to be regarded as for the benefit of all such persons entitled to sue as either are domiciled in British India or, not being domiciled there, yet express a desire to take the benefit of the suit.

A suit to enforce a liability for the death of a passenger may be brought either by the personal representative of the passenger or by any person for whose benefit the liability is enforceable as indicated above.

In a suit to enforce liability for damage sustained by the death of a passenger the amount recovered, after deducting costs to which the defendant may not be amenable, is to be divided between the persons entitled to the benefit in such proportions as the Court may direct.

The Court has a discretion at any stage of a suit such as above alluded to, to take into consideration (a) the limitations on the liability of the carrier of which he may avail himself under the Rules in the First Schedule appearing and (b) the effect upon him of any proceedings which have been, or are likely to be, instituted outside British India in respect of the same death; and having done so, may make such order as appears to the Court to be just and equitable.

*Litigation in respect of injury only, or for compensation in respect of delay.*—By Rule 28 of the First Schedule the plaintiff in a suit for damages in respect of injury or delay may, at his option, institute his suit in the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment where the contract has been made, or in the Court having jurisdiction at the place of destination.

*Suits in respect of a passenger's death.*—The plaintiff in such a suit has the same option as is stated above in respect of personal actions for compensation for injury or delay.

*Limitation.*—The period of limitation within which suits under this Act must be brought is two years, calculated from the date at which the passenger arrives at the destination contemplated in the contract of carriage, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. These provisions are contained in Rule 29 of the First Schedule. The carriage is obviously stopped where the passenger has died, or where his dead body is disembarked. In all other cases the passenger would appear to have an option to calculate the period of limitation from whichever of the alternative dates given in the Rule best suits him.

*Bar to contracting out of the Rules.*—By the provisions of Rule 32 of the First Schedule it is laid down that any clause contained in the relative contract of carriage and all special agreements entered into before the occurrence of the damage relied upon, and by which the parties purport to infringe the rules laid down by the First Schedule, whether by agreeing as to the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

*Statutory insurance under Motor Vehicles Act.*—In England compulsory insurance of third parties has been in operation for some years past. The effect there of the relative statutes is not only to protect third parties in form but also in substance; since they may proceed directly against the insurers instead of through him who has taken out the insurance.

A recent Act of the Indian Central Legislature<sup>1</sup> seeks to bring motor traffic and its incidents under a more comprehensive control than had hitherto been attempted. By it compulsory insurance against third-party risks is made the subject of a special chapter, namely Chapter VIII. That chapter, by virtue of section 1 (3), does not take effect until the 1st of July, 1943. The rest of the Act came into force on the 1st of July, 1939. With the foregoing brief indication of the degree to which the insurance of third-party risks will eventually be obligatory in India, it is proposed to leave a more detailed discussion of the matter to that part of the present Chapter which is concerned with motor vehicle insurance; for to that topic the whole subject properly belongs.

### 3. *Sickness.*

In the class of business known as Permanent Sickness Contracts the practice is to accept only selected lives: which means that the insurer's medical advisers are required to be specially careful to reject any proposer who does not exhibit a more or less clean bill of health, or who, on examination or otherwise, does not appear a desirable life from the insurer's point of view. Premiums tend to vary with the proposer's age at the date of his application. The period which may be covered often extends to the whole of the expected professional or commercial career.

Insurances of this type have not, as yet in India, given rise to any reported litigation. It is indeed doubtful if any permanent sickness business is at present underwritten in India. And it would appear that "all sickness" contracts are not as yet popular with insurers in this country. It is, however, possible to take out policies against certain specified diseases, either as a separate form of insurance contract, or as combined with a personal accident contract. To a limited extent business seems to be done in combined personal accident and "all sickness" policies.

### 4. *Public liability insurance.*

**Preliminary.**—The notion which lies behind the expression "public liability insurance" is legal rather than commercial. It derives from the circumstance that the law imposes on everyone an obligation to use such reasonable care in his dealings with his fellowman as will not expose that fellowman to unnecessary risk in life, limb, or estate. It is usually in the handling of what a man considers his own to do what he likes with, that he somehow contrives to bring injury to the person or to the property of others. As a matter of law the obligation imposed upon one who owns anything capable directly or indirectly of causing damage to someone else is expressed in the maxim *sic utere tuo ut alienum non laedas*.<sup>2</sup>

**Insurable interest.**—Breaches of the obligation alluded to give rise to a right in the person injured to sue for damages. This is as true in respect of injuries to property, as it is of injuries to the person. A peril arising from such a liability in law is obviously something in which all of us have, in theory, an insurable interest. Accordingly it is a risk

<sup>1</sup> The Motor Vehicles Act (IV of 1939).

<sup>2</sup> "So to use what is your own as not to harm another."

against which any person may insure himself. In fact a large volume of business is done in the provision of cover against liabilities of the foregoing order.

It happens, however, that exposure to an action for damages is not necessarily the only risk which the ordinary man in the modern world is called upon to run in respect of the conduct of his affairs. He may find that he has let himself in for express punishment. In India he may find that his conduct renders him amenable to some sanction created by the Indian Penal Code, or that he has offended against some municipal or other special law under which a penalty may be imposed upon him. At the worst he may find himself charged with having caused someone's death by conduct so utterly reckless as to bring him within the mischief of that part of the Indian Penal Code which deals with "*culpable homicide not amounting to murder*". Another specific offence created by the same statute is "*causing death by a rash and hazardous act*". At the mildest, he may find that he has committed a breach of some municipal bye-law or of some rule having the force of law under a statute designed to subserve the ends of traffic control, or to make provision for the safe use of electrical power. Again, he may by his conduct in the use of his own, premises or of those demised to him, have rendered himself amenable to the law of public nuisance. In any of the foregoing circumstances he may find himself at the mercy of a penal sanction, and under the necessity either of submitting himself to it, or of providing himself with adequate professional aid towards avoiding it. In fact, a considerable volume of business is done in designing insurance to cover losses resulting from such vicissitudes of fortune.

Certain nice questions have arisen as to how far policies framed to shield persons from paying the legal penalty sanctioned for a criminal act, are contracts themselves enforceable in law. There has never been any doubt of the legality of contracts of insurance where the risk is a liability merely exposing the assured to an action for damages. A general review of the authorities in England, the Dominions and in America points to one general proposition: that where the liability has been incurred by the deliberate act of the assured, and the resulting damage to life, limb or property, because it arises out of the assured's intention, has brought him within the law of crime, he cannot recover. For the law regards it as against public policy for a man to receive compensation under a contract or indeed any sum of money designed to indemnify him for paying a legal penalty for the offence he has committed. *Ex turpi causa non oritur actio*<sup>1</sup> is the maxim which applies. Modern judicial opinion does not, however, go so far where the wrongdoing, though exposing the assured to some penal sanction, does not arise from an intentional act. Nor do the courts apply the maxim in cases where the offence committed is purely technical. It may thus be broadly stated that where the injury or damage for which the assured is liable does not arise out of an offence intentionally committed,<sup>2</sup> a contract of liability insurance, if otherwise covering the particular liability, will not be void as against public policy. The following three modern cases sufficiently illustrate the foregoing summary:—*Tinline v.*

<sup>1</sup> "From a cause which is shameful no action (at law) can arise."

<sup>2</sup> Students of the history of Criminal Law in India will remember that there is one essential ingredient: namely "wicked intention"—the wicked intention which the common law styles "*mens rea*" or "the wicked mind". The *turpis* (or shameful) cause depends on the presence of *mens rea*.

*White Cross Insurance Assn., Ltd.*, [1921] 3 K.B. 327; *James v. British General Insurance Co., Ltd.*, [1927] 2 K.B. 311; *Haseldine v. Hoshen*, [1933] 1 K.B. 822. In respect of some forms of vehicle-insurance policies it is said that many insurers are reluctant to offer cover for legal expenses incurred where the same are so incurred by the assured in defending himself against a criminal charge arising out of an accident otherwise contemplated by the relative policy, in the belief that the provision of any such cover would be contrary to public policy. The writer is unable to appreciate by what chain of reasoning this opinion has come to be entertained. By the law of India, as of England, a person is presumed to be innocent of any offence alleged against him until the same shall have been proved in due course of law. It is thus difficult to see how aid to a "presumably innocent" person can be contrary to public policy. Indeed the policy of the law is to see that no man charged with an offence goes undefended, unless by his own choice; and, in respect of the gravest offences, the policy of the law is not to permit him to go undefended at all or even to plead guilty. The Court in the cases alluded to refuses to accept such a plea and it assigns Counsel in cases where the accused could not otherwise obtain the benefit of such aid. In these circumstances it is submitted that a policy of insurance which covers legal expenses incidental to an assured's defence, in the circumstances contemplated, would not be void under the Indian Contract Act as being contrary to public policy.

The defence of illegality throws upon the insurer the *onus* of establishing it; for it has been well-settled ever since *Thurtell v. Beaumont*, [1823] 1 Bing. 339, that the Court will presume the contract to be legal, since a court leans towards supporting contractual obligations<sup>1</sup>. If the assured cannot recover by reason of the illegality of the contract, it follows that no one claiming through him or, as representing his estate, can succeed on it; for no one can have any better title than his (*Cleaver v. Mutual Reserve Fund Life*, [1892] 1 Q.B. 147, 152). In an early case (*Moore v. Wooley*, [1854] 4 El. & Bl. 243), the question arose whether a *bona fide* assignee for valuable consideration was debarred from recovering upon a policy which undoubtedly the assured himself could not have enforced. Lord Campbell thought he was not. "Where" said he "we are called upon to nullify a contract on the ground of public policy we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind". (See, also, *P. Samuel & Co. v. Dumas*, [1924] A.C. 431, 474.)

**Substratum of the contract.**—A contract of insurance of the type under discussion offers an indemnity against specific risks which the parties contemplate the assured to be exposed or likely to be exposed to. Those risks are one and all of the same nature, in the sense that

<sup>1</sup> Towards discharging the *onus* of proving that a crime has been committed, the insurers may rely upon a conviction in a criminal court. But it has to be noted that the conviction only amounts to *prima facie* evidence of guilt. (*Re Crippen*, [1911] P. 178.) This has the effect of shifting the burden on the assured of establishing, in any way he likes in the civil action, that such a conviction ought not to have taken place. As between him and the Crown, except in a court exercising an appellate or revisional criminal jurisdiction, he could not be heard to say so; but as between him and the other party to a contract of liability insurance, he may say what he likes and establish what he can. It has been recently decided in England that the verdict of a Coroner's jury is not even *prima facie* evidence of guilt, so far as the civil action he concerned. (*Bird v. Kemp*, [1916] 2 K.B. 602; *Barnett v. Cohen*, [1921] 2 K.B. 461.)

the risk assured against is a "liability". The substratum of the contract, therefore, is "liability" in a *legal*, and not in any *moral* or *social*, sense. It follows that the right to the sum assured or to any part of it, wholly depends for its validity upon there being in fact a liability, legal in character, which the assured has, or has had, to meet in terms of money or money's worth. It follows, again, that if the assured has taken upon himself to meet a supposed liability by a mistaken sense of obligation, what he has done is not within an ordinary policy of liability insurance, and he cannot recover the payment he has made. The foregoing propositions are illustrated by the decisions in the following cases:—*Western Assurance Co. of Toronto v. Poole*, [1903] 1 K.B. 376; *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.*, [1886] 12 A.C. 128; *North British & Mercantile, etc. v. Moffatt*, [1871] 7 C.P. 25; *Australian Widows' Fund Life, etc. v. National Mutual Life, etc.*, [1914] A.C. 634; *Liverpool Mortgage Insurance Co.'s case*, [1914] 2 Ch. 617.

In a recent case, *Dickinson v. Del Solar*, [1930] 1 K.B. 376, the assured enjoyed "diplomatic privileges", i.e., his position in a foreign diplomatic service rendered his status *extra territorial* and thus exempted him from certain sanctions. These the assured had waived. It was held that he had not thereby lost his rights against his insurers under the particular policy in suit.

There is recent authority for the proposition that, if in an action against the assured, the findings of fact or of mixed law and fact are against him, those findings are conclusive as to the liability which entitles him to make a claim upon his insurers. (*Smellie v. British General Insurance Co.*, [1918] W.C. & Ins. Rep. 233.)

**Description of the risk.**—Accurate description of the liability which is to be covered is of the utmost importance in this class of business. Indeed the great majority of defences are on the ground that the claim made under the policy is not covered by it. Naturally where what has occurred, in respect of which the assured has become exposed to liability, is the subject of an express exception, the difficulty in deciding between the rival views is less than where the controversy turns on the language used in describing the risk. Sometimes the policy is designed to cover a class or classes of liability; in other instances, the risks assumed are narrowed to one particular kind of liability.<sup>1</sup> It may, indeed, be cut down to one or more specific events.

Although the description of the risk appearing in the relative instrument should be as precise as possible, it often happens that this description has to be read with some document expressly attracted, such as what appears in the proposal form. As in other types of insurance business, there are often a number of questions addressed to the proposer the answers to which are expressly made the basis of the contract, and are frequently subject to an express declaration warranting their truth. The effect of contracts formed in this manner has already been summarised in the foregoing Chapter of this treatise.<sup>2</sup> It must here suffice to say, therefore, that in the class of insurance under discussion, the law relating to warranties and to conditions generally which has been the subject of commentary there and earlier in this treatise applies.<sup>3</sup>

<sup>1</sup> In *Davies v. Hoeken*, [1937] 3 All E.R. 192, the liability involved was in respect of "neglect omission or error". It was held that the assured could not recover as for loss resulting from fraudulent conduct.

<sup>2</sup> See Chapter VII, pp. 401-409, *ante*.

<sup>3</sup> *I.e.*, Chapter II, pp. 38-41, *ante*.

**Employers' liability.**—Employers' Liability insurance, as a special branch of liability business, has been in existence a great many years in Great Britain, Ireland, and in the Americas. Employers' Liability legislation in England led to the immediate formation of a joint-stock company floated, as its name implies, to afford this kind of cover to employers of labour. Other companies soon followed the lead thus given. The early Employers' Liability Acts were succeeded by statutes known as Workmen's Compensation Acts. It is the last-named type of legislation which has been imitated in India.

In this country the statutory liabilities in respect of workmen's compensation are the creatures of the Workmen's Compensation Act (VIII of 1923, as amended to 1933). The Act creates a special judicial officer styled "the Commissioner", and permits local governments to make rules for carrying out the general purposes of the Act. There is one Commissioner for each Indian province to which the Act applies. It is a provincial appointment. The proceedings before him in which a claim to compensation has to be decided are entirely judicial in character. There is a limited right of appeal to the local High Court; and the Commissioner may, at his discretion, submit any matter of law for the decision of the High Court; and, if he does so, he must decide the question in conformity with such decision. Where a master has paid compensation under the statute, he cannot, in respect of the same injury, be sued in the Civil Court. (*Selwood v. Townley Coal & Fireclay Co.*, [1939] 4 All E.R. 34.)

A substantial volume of business is done in India by employers of labour in insuring their liability to pay compensation under the above-mentioned statute. In contemplation of law such a statute makes the employer, to the extent set forth, an insurer of his workmen against personal accident to them; and, where this is so, it is the statute which affords him an additional insurable interest in their welfare. To insure his own liability under the statute is, strictly speaking, to enter into a contract of re-insurance.

**Liability for servants otherwise than under Workmen's Compensation Act.**—The scope of the Workmen's Compensation Act is strictly limited. It does not purport to cover the whole responsibility of a master for the safety of his servants. Such a liability in fact exists *dehors* the statute. It is, indeed, part of the general law relating to Negligence, under which an action lies by anyone who has sustained injury to his person or damage to his property by the negligence of another.

The relation of master and servant imposes on the former a rather special degree of caution, inasmuch as he invites the servant, if not to live upon his property, at any rate to work there; and if not in and upon his property in the most strict sense of the term, at any rate at or within premises demised to him. In all such circumstances it is deemed part of the contract of service that what the servant is called upon to do shall be reasonably safe for him to do,<sup>1</sup> unless the contract be of a special nature wherein the servant clearly undertakes to perform dangerous, or at any rate hazardous, duties.<sup>2</sup> It is also to be deemed part of a contract

<sup>1</sup> This is not to say that the master warrants either the place or the work itself to be safe. The implied term is sometimes spoken of as a duty to take all reasonable precautions to prevent accidents. (*Bond v. Wilson & Sons*, [1906] 24 T.L.R. 238; *Cole v. De Trafford* (No. 2), [1918] 2 K.B. 523.)

<sup>2</sup> The ordinary hazards (whatever they be) incidental to the particular services, for which the servant hires himself out, are risks which in the view of

of service, that the premises in which a servant is required by his contract of service to live or to work in shall be in a reasonably safe condition for the purpose of such habitation and/or service. In such circumstances if the servant sustain injury to his person or to his own private property consequent upon a breach of duty on the part of the master in relation to the man's personal safety, or to that of the servant's property, and the servant himself has not by his own negligent conduct contributed to the result, the master is liable. Should the injuries sustained by the servant result in the latter's death, the dependants of the deceased, if circumstanced as required by the relative statute, may maintain an action against the master under the Fatal Accidents Act.

All the liabilities to which a master is exposed under the circumstances summarised above are eminently insurable; and in many parts of the world a very large volume of business is done in providing the requisite cover. In India there are procurable so-called Table "C" Workmen's Compensation Policies in virtue of which in the event of any employee of the assured (such an employee not being a "workman" within the meaning of the Workmen's Compensation Act, 1923, and subsequent amendments) sustaining an injury by accident in circumstances which, if he had been a workman within the meaning of that statute, would have entitled him or his dependants to compensation, the insurers undertake at the request of their assured to pay compensation to the employee so injured or to his dependants, as the case may be, in terms of the said Act.

**The doctrine of common employment.**—A servant may, of course, meet with an injury at the hands of a fellow servant, when the immediate question which arises is, how far, if at all, the master may be made liable.

In the view of the Common Law such a risk was, and is, considered as something incidental to anyone's employment as a servant, since in accepting the offer the servant must be taken to envisage either that an injury may befall him through some act on the part of an existing fellow servant or on the part of some one who may become a fellow servant. Accordingly the general rule is that the master is not liable.

This view of the matter is sometimes referred to as the doctrine of "common employment". To be within the rule, both servants must firstly be employed by one and the same master,—which makes them fellow-servants,—and must be employed under such circumstances as could at least be reasonably envisaged as possibly bringing them together (*Bartonshill Coal Co. v. McGuire*, [1858] 3 Macq. 300, 307 H.L.) which makes them "commonly" employed. The concept of common employment is, however, very wide. To make out a case of "common employment" it is not necessary for the two servants to be at work upon the same task or even upon one of the same kind. All that is required to support the doctrine is that they should both be employed in connection with the industry, profession or other business of their common master. (*Coldrick v. Partridge, Jones & Co.*, [1910] A.C. 77.) There is no common employer where one is in the service of a contractor and the other in that of a sub-contractor working under the former, even if the two servants be engaged upon a common task. (*Johnson v. Lindsay & Co.*, [1891] A.C. 371; *Cameron v. Nystrom*, [1893] A.C. 308.)

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Common Law a servant impliedly undertakes to run by accepting the offer of the particular employment.

The master, though he does not warrant to any one servant the skill, capacity, or good temper, of any other servant, has the common law duty of taking reasonable care to choose servants competent and otherwise suitable for the duties he assigns to them; and if he has not so chosen, the defence of common employment will not be available to him if one servant in the course of his employment sustains injury at the hands of another. (*Wilson v. Merry*, [1868] 1 Sc. & Div. 326 H.L.; *Fanton v. Denville*, [1932] 2 K.B. 309 (C.A.).)

In England the Employers' Liability Act of 1880<sup>1</sup> made inroads on the doctrine. The Act has been largely, but by no means wholly, superseded by legislation known as the Workmen's Compensation Act, 1925.<sup>2</sup>

In India there is no Employers' Liability Act (*eo nomine*) on the Statute Book. But the Workmen's Compensation Act, already alluded to, extends a master's liability so as to make the doctrine of common employment inapplicable where the master and the persons employed are otherwise within the scope of that statute. But as already pointed out, the Act itself does not by any means cover all the relations of master and servant. It follows that wherever the parties are outside the scope of the statute, the doctrine of common employment is available to the master as a defence in India.

**Negligence generally.**—A liability for damage arising from negligence or any other tort attaches not only to an individual but to any association of individuals. Thus a club may be liable for a nuisance or for so negligently carrying out any of its objects as that the lives, limbs or the property of other people are endangered. Successful actions for negligence have been brought against Golf clubs by users of public roads contiguous to some part of the golf links concerned. Where injury has resulted from a negligent user of a part of the links in close proximity to the highway, the individual golfer has been made liable. But in certain instances the club itself has been made liable either for the lay-out of the course being such as showed a complete disregard for the safety of persons using the highway, or because insufficient precautions had been taken by the club to warn the users of the highway or to control those playing over the links. A brief summary of the legal concept of negligence has already been offered earlier in this treatise.<sup>3</sup>

### 5. Insurance of premises against other than fire risks.

Though commonly the insurance of premises is primarily against fire, other risks if accepted being incorporated in the same instrument, insurances are in fact effected specifically against damage by earthquake, flood, hurricanes, and so forth. In such cases it may well be a matter of difficulty to determine whether the condition in which the property covered is reported to be after an alleged accident, is wholly or primarily to be attributed to any of the specific risks undertaken.

Mention having already been made of the general principles by which Courts are guided in controversies of this character,<sup>4</sup> the scale of this

<sup>1</sup> 43 & 44 Vict., c. 42.

<sup>2</sup> 15 & 16 Geo. V., c. 84.

<sup>3</sup> Chapter VI, pp. 309-313, *ante*.

<sup>4</sup> Chapter V, pp. 218-220, *ante*.

treatise prevents any repetition of them. There is, however, another type of policy belonging to the general category of insurance of property other than against fire, to which allusion may properly be made in the present Chapter. In so saying a reference is intended to policies issued to cover loss or damage caused by subsidence or collapse.

Questions of primary importance in this class of case both to insurers and assured have recently been determined by the King's Bench Division in London in the case of *David Allen & Sons Billposting, Ltd. v. Drysdale*, [1939] 4 All E.R. 113. The material facts were that the assured were owners of a building in London covered by a Lloyd's policy against loss or damage caused by subsidence or collapse. The currency of the policy was from the 20th of December, 1937, to 19th of December, 1938. The assured as owners were the recipient of a notice by the London County Council dated the 7th of October, 1938. This notice being what is commonly known as a Dangerous Structure Notice made it reasonable, and in the particular circumstances incumbent (as it was held), on the owners to demolish the building. The necessary resurvey of the condition of the structure taking place during the currency of the policy revealed obvious signs of subsidence or settlement. The main question of fact was to determine whether subsidence or settlement did not indicate an event of long standing and therefore outside the risk. This point was decided against the assured. The second question was whether demolition in the particular circumstances involved "collapse" within the meaning of the policy. This point was also determined against the assured. The decision, however, provoked useful definitions of both the words "subsidence" and "collapse": it being held that the former "meant primarily sinking in a vertical direction, but might also include settlement i.e., movement in a lateral direction<sup>1</sup>"; while "collapse", it was held, denoted "falling, shrinking together, breaking down or giving way through external pressure, or loss of rigidity or support". It was, as already indicated, held that the word "collapse" could not cover intentional demolition.

## 6. Vehicle insurance.

Vehicle insurance concerns itself not only with every form of conveyance propelled by mechanical power, e.g., steam, electricity or oil, but with animal-drawn carts or carriages<sup>2</sup> and such as are moved by man-power only, such as the hand cart, the rickshaw, the Bath chair, the palanquin or palki, and the dandi. Thus railway or tramway rolling stock will be "vehicles" for the purpose of such insurance contracts. Motor car insurance is but a branch of vehicle insurance; and its importance in any one country depends wholly upon the degree to which vehicles whose power is derived from internal combustion engines have successfully

<sup>1</sup> It may respectfully be doubted whether this would satisfy an architect's or civil engineer's notion of "settlement". A tilting of some part of the foundation out of vertical so that the foundation as a whole is no longer horizontal would surely be regarded as within the concept of a settlement and yet there would have been no lateral displacement at all.

<sup>2</sup> In India various forms of cart are still in use for draught by camel, bullock, water-buffalo or mule. The commoner types of horse-drawn carriage still in regular use include the Landau, the Victoria (or other type of phaeton), the dog-cart, the buggy, the jaun (a carriage capable of being closed in on all sides by sliding shutters), the tonga, and the ekeka. The great majority of these vehicles, many of which are frequently injured by collision or by other accidents, remain uninsured.

ousted other forms of conveyance or traction. In India motor traction is obviously on the increase, and the volume of insurance in India against risks incidental to the use of mechanized vehicles is, indeed, notoriously expanding. The steam roller has for many years been in use in India. But municipally-owned rollers are often uninsured. The steam traction engine is today uncommon in this country. Motor tractors have now appeared in their place.

### 7. Motor vehicle insurance.

In this class of business, policies are now-a-days obtainable of a most comprehensive character. Not only the vehicle itself, but every conceivable accident arising from, or connected with, its user may generally be covered by one and the same instrument.

The profession in general classifies motor insurance business under the respective heads of private cars and commercial vehicles, but nevertheless puts motor cycles and the risks incidental to their use in a class apart, subdividing that class again into private motor cycles and those used for commercial purposes. The following are the risks commonly covered in connection with the types of vehicles named above:—

*Private cars and private motor cycles:* loss of, or damage to, the vehicle,<sup>1</sup> its accessories<sup>2</sup> or spare parts; public liability; injury to third persons or to the property of third persons; personal injury to the owner and/or his servants or other car occupants, arising out of an accident in which the vehicle insured is involved; medical expenses of occupants; defence of the insured and/or the driver in any judicial proceeding; risks incidental to foreign travel in the insured car including any of the above-mentioned perils.<sup>3</sup> With regard to drivers, by profession or otherwise, insurers will always extend the protection to more than one in the service of the insured; but, naturally, every additional risk so undertaken usually involves an enhancement of the premium. What has indeed been indicated above represents the matters comprehended in ordinary policies at ordinary rates of premium. Now-a-days, however, there is a tendency on the one side to demand, and on the other to agree to give, insurance against numerous other risks incidental to a more extended user of motor vehicles for private travel in or out of urban areas and abroad. Extended protection so given is usually effected by endorsement upon the face of the instrument or, which has the same legal effect, by the attachment thereto of one or more printed or written "slips". Among the additional risks which may be thus covered are to be mentioned loss of or damage to personal belongings by theft, fire or any other accidental cause; liability to driver under Workmen's Compensation Acts or other like legislation, compensation for loss of time in effecting repairs to the insured vehicle consequent upon accident; provision of personal accident benefits to any of the car's occupants.

<sup>1</sup> A "vehicle" may or may not mean the chassis plus the body or other superstructure. In ordinary use the word "chassis" comprises the engine and the whole wheeled frame on which the body will ultimately be erected. It may, however, mean that wheeled frame only. The word was considered in *Falkner v. Whitten*, [1917] A.C. 108.

<sup>2</sup> To be an "accessory" the object must be a thing in itself which if and when attached to another object, e.g., a vehicle or a cannon, enhances the general utility of that other object. Thus spare or duplicate parts are not accessories properly so-called. (*Armstrong & Co. v. Hutchins Co.*, 13 Times Reports 188.)

<sup>3</sup> A condition excepting "any member of assured's household" held to include a meter living under the same roof. (*English v. Western*, [1930] 4 All E.R. 244.)

There are, of course, special risks incidental to the use of motor cycles; and these may also be specially covered. Among such may be mentioned injury to anyone riding on the pillion or in a side-car or trailer.<sup>1</sup> It is possible also to insure against failure to pass reliability tests.

*Commercial vehicles.*—These include the ordinary motor van or lorry, the omnibus, the char-a-banc,<sup>2</sup> the motor cycle when used for other than private purposes, and, of course, any side-car or trailer or adjuncts thereto. For commercial purposes policies of insurance to cover risks incidental to the user of any of the foregoing types of vehicle are now-a-days more or less standardised in form. Risks covered are analogous to those already enumerated above in respect of private motor vehicles.<sup>3</sup> But, naturally, there are certain additional losses to which a commercial user of a motor vehicle may give rise. All these may be covered by appropriate terms inserted in or attached to the instrument. Of such may be mentioned (a) loss of user, (b) spark risks, (c) liability in respect of passengers or goods carried and (d) in respect of breaches of statutory regulations by servants or agents for whose conduct the owner or the licensee of the insured vehicle would or might be made liable.

So far as a policy offering such large protection partakes of the nature of personal accident insurance, the reader is referred to what has been said on that subject earlier in the present Chapter.<sup>4</sup>

Provisions offering protection to the assured against legal liabilities fall within a topic which in the matter of certain principles has also been discussed above.<sup>5</sup> But there are other liabilities, the special creation of problems connected with motor traffic under modern conditions, of which something must be said.

The increase in sales of motor vehicles in India shows every sign of leading to results which have already been experienced wherever such increase has outstripped legislative control of the consequential traffic. In Europe and the Americas the reduction in the price of motor vehicles for private use consequent upon unprecedented international competition among manufacturers, coupled as this was with extended facilities for acquiring immediate user of motor cars and motor cycles on credit terms,<sup>6</sup> brought travel by such carriages of their own within the reach of an ever-increasing number of the population. In London—to take

<sup>1</sup> A "pillion" is a seat fitted behind the driver. A "side-car", as its name implies, is a carriage fitted to the machine, but designed to carry its passenger alongside the driver of the cycle. A "trailer" is a carriage attached in rear of the cycle and which to some extent swings free of it. Trailers of a larger type are now-a-days procurable for attachment to motor cars. Normally a trailer of the latter sort is not included in any motor car policy, and thus needs to be separately insured.

<sup>2</sup> A "char-a-banc" is a vehicle—now-a-days most popular in Europe and elsewhere, for local tourist traffic in connection with mere sight-seeing—in which the passengers are accommodated in rows of benches arranged parallel to the driver's seat, each successive bench being slightly raised above the one in front so as to provide for all the travellers an uninterrupted view ahead.

<sup>3</sup> Often including similar transit risks on land or sea.

<sup>4</sup> See pp. 457-474, *ante*.

<sup>5</sup> See pp. 474-480, *ante*. It may be noted that in India risks commonly covered include "legal liability to passengers" under Private Car Policies, but not under Commercial Vehicle Policies. With regard to the latter, varying indemnities are given "per person" and "per accident" (i.e., one or more claims arising out of the same occurrence) on payment of additional premium.

<sup>6</sup> Reference is here made to cheap hireage and to acquisition under what are called "hire-purchase" agreements.

an instructive example—the primary results were, firstly, that within a decade of the close of the last great war the volume of traffic in the central thoroughfares had become more than such avenues could adequately cope with, unless the needs of pedestrians were to be entirely overlooked. Traffic congestion presently reached such a point that even special routing, whereby many vehicles were compelled to make long detours<sup>1</sup> in order to reach their passengers' destinations, failed to solve the problem<sup>2</sup>; secondly, casualties affecting not only pedestrians but occupants of motor vehicles, annually reached figures comparable only to what is to be expected in a minor war. It then transpired that motor cars and motor cycles were, by night as well as by day, being driven at high speeds by lunatics, epileptics, folk blind of one eye or with such defective sight as to see nothing accurately; that many persons licensed to drive were afflicted with what is known as "double" vision or who were colour-blind or more or less deaf. Add to persons so disabled the congenitally clumsy and the slow-witted, and some idea of the public dangers attending upon any system of easily acquired permission to drive mechanical contrivances along public roads will be perceived.

It is in this state of things that owners and users of motor vehicles are becoming increasingly conscious of the value of insurance contracts to cover the risks to which they are hourly exposed. Prominent among such risks are legal sanctions connected with breaches of special legislative enactments and municipal and other rules of more or less statutory force to which such legislation gives rise.

**Motor Vehicles Act, 1939.**—The Motor Vehicles Act (IV of 1939) which has repealed the Indian Motor Vehicles Act (VIII of 1914) marks a great step forward towards an administrative system for the legislative control of motor traffic. Its provisions will eventually have far-reaching effects upon personal accident, liability, and motor vehicle insurance in this country. By section 134, which repeals the earlier statute above alluded to, all rules made by a provincial government under section 11 (2) and those made by the Governor General-in-Council under section 14 of the former Act will remain in force till the 31st of March, 1940, unless in the meantime they be cancelled<sup>3</sup> by the respective authorities above-named.

Most provincial governments have already issued regulations with regard to the insurance of public motor vehicles. Such regulations are in the form of statutory rules made in exercise of powers conveyed by section 11 (2) of the former statute. Those rules are not merely kept in force until March of 1940, but, by section 134 (3) of the Motor Vehicles Act, 1939, are expressly to retain their full statutory force until the provisions of Chapter VIII of the new statute come into operation, i.e., they will continue to have the force of law until the 1st of July, 1943, when, on the provisions of said Chapter taking effect, they will automatically be superseded. A brief analysis of the provisions of Chapter VIII

<sup>1</sup> The loss entailed by such uneconomic traffic movements has yet to be worked out. It must, in modern cities where such routing is adopted, be enormous.

<sup>2</sup> Between 1935 and 1939 traffic along London's central thoroughfares generally moved at an average speed less than was every day accomplished over the same routes by a well-horsed private carriage thirty years earlier. This was largely the effect of recurrent periods of immobility imposed upon the whole column by the necessity of providing recognized places and times for batches of pedestrians to cross the main roads under conditions of safety.

<sup>3</sup> By notification in the Official Gazette.

(which, *inter alia*, for the first time provides for third-party insurance) is offered hereafter.<sup>1</sup>

**Disability.**—Persons under eighteen years of age<sup>2</sup> are wholly disqualified for driving any motor vehicle<sup>3</sup> in any public place. By section 4 (2) persons under the age of twenty-one are disqualified from driving a transport vehicle<sup>4</sup> in any public place. This general disability is, however, limited by the provisions of section 14 which indicate the conditions under which persons over eighteen, but under twenty-one, years of age may drive motor vehicles which are the property of the Central Government.

**Reliability.**—As part of the machinery for insuring reliability a medical examination is prescribed; and the applicant for the licence must himself give precise information touching any physical disability of which he may be aware. If it appears from the nature of his answers, or from the medical certificate required, that the applicant is suffering from epilepsy, lunacy, heart-disease likely to produce sudden attacks of giddiness or fainting, inability to distinguish with each eye at a distance of twenty-five yards in good daylight (with the aid of glasses, if worn) a series of seven letters and figures in white on a black ground of the same size and arrangement as those of the registration mark of a motor car, a degree of deafness which prevents the applicant from hearing the ordinary sound signals, colour-blindness and night-blindness, he cannot be licenced. A further absolute disqualification in respect of a person seeking to obtain a licence to drive a public service vehicle is leprosy.

Reliability tests are prescribed in the Third Schedule to the Act. If properly carried out, they will add a much-needed protection to the general public. But there is room for the view that the Act should have obliged all persons already holding a licence on the 1st of July, 1939, to submit themselves to medical examination and reliability tests, as if they were applying under the Act for their first licence.<sup>5</sup>

**Exceptions.**—There is one exception which is rarely absent from policies of this description: namely, loss of value in the nature of deterioration either of the whole or of any part of the insured vehicle by what is

<sup>1</sup> See pp. 490-495, *post*.

<sup>2</sup> The age of majority under the Indian Majority Act (IX of 1875).

<sup>3</sup> This expression includes a motor cycle, a trailer and a chassis to which a body has not been attached. It does not include a tram-car. (Section 2 (18).)

<sup>4</sup> The expression means, for the purposes of the Act, a vehicle designed to carry goods, a locomotive or a tractor (save such as are used solely for agricultural purposes) and any "public service vehicle", which is defined as a motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and including a motor cab, stage carriage, and what the Act styles "a contract carriage". A "contract carriage" is a motor vehicle carrying passengers for hire or reward under a contract to carry from one place to another without stopping to pick up or to set down passengers other than those included in the special contract of carriage. It does not include a motor vehicle possession of which has been temporarily transferred by an express hire agreement for use as a private vehicle and which is used only for such purpose. See sec. 2 (3), (8), (33).

<sup>5</sup> The writer is acquainted with the owner of a large and powerful car, who more or less habitually drives it himself both by night and day, though he is without stereoscopic vision and is almost totally colour-blind. By sec. 118 it is, however, made a penal offence for anyone to drive a motor in a public place, when, to his knowledge, he is under a disability calculated to cause his driving to be a source of danger to the public. Abetment of any such conduct is also made a punishable offence.

termed "wear and tear"<sup>1</sup>; and this is so even where additional premium is charged to cover general or specified mechanical breakages.

*Wear and tear.*—What is aimed at by an express exception against depreciation by "wear and tear" is that deterioration which nature insists upon, and which man with all his skill can do little to mitigate and nothing to prevent.<sup>2</sup> For no object can ever be maintained in a completely static or stable condition. Decay inevitably occurs; sometimes the quicker because the property is constantly in use, in other instances because the thing has not been used at all.

*War.*—An equally common exception is framed as in clauses drawn for purposes of marine, fire, life or personal accident insurance where the object is to exclude risks referable to war or warlike conditions. The effect of such stipulations has already been discussed earlier in this treatise.<sup>3</sup>

In England at the outbreak of the war in September, 1939, it seems that when private cars were requisitioned by certain recently-created authorities,—which may be referred to as "civil defence" authorities,—the question arose whether existing insurance policies on motor vehicles covered risks incidental to such user, or whether a war exception clause, where included in the instrument, would apply. The difficulty was met by the patriotic action of motor insurers generally who came to an agreement amongst themselves in consequence of which they were able to make a public announcement advertising an extended cover on existing policies without additional premium.<sup>4</sup> It will be seen that where the

<sup>1</sup> It is sometimes of importance to distinguish damage by "wear" from damage by "tear". To give an example: in the Wills Act of 1837, sec. 20, the law showed itself prepared to treat a "torn" Will as strong presumptive evidence of the revocation of the testament. In *Bigge v. Bigge*, (1845) 9 Jur. 192 the document in dispute had been found in several separate pieces which manifestly had at some time been joined together so as to form a whole. The evidence showed the severances to have been brought about by constant folding and unfolding of the document while it was still in the hands of the testator. The damage done was held to have been accomplished by "wear", and not by "tear".

<sup>2</sup> In *Manchester Bowling Warehouse Co. v. Carr*, [1880] 5 C.P.D. 507, it paid one of the parties to suggest that an entirely unlooked for event, such as might properly be styled an "accident", might well fall within a covenant concerning "reasonable wear and tear".

"These words" said Lindley, J., in delivering judgment, "no doubt include destruction to some extent—destruction of surfaces by ordinary friction—but we do not think they include total destruction by a catastrophe never contemplated by either party. In the particular instance the catastrophe resulted from a perfectly reasonable use of the premises demised."

<sup>3</sup> See pp. 168, 257, 258, *ante*.

<sup>4</sup> The announcement was as follows:—

"The policy will be deemed to have been extended to cover the liability of the civil defence authority using the vehicle without the necessity for the endorsement of individual policies.

The driving in such circumstances may be by anybody permitted by the policy, which, in the case of the normal private car policy, includes any licensed driver driving with the permission of the owner. Where passenger risk is already covered by the policy, this cover will continue to operate. In other cases application should be made to the insurer.

It should be pointed out that this extension of cover does not override any clause to which the policy is subject which excludes the consequences of war, etc., and that therefore the policy would not apply to claims arising out of specific acts of the enemy or of the defence services.

This announcement applies also to vehicles requisitioned or otherwise taken over by civil defence authorities, the policies on which will continue to apply subject to the limitations referred to above, and will be extended without the need for endorsement to indemnify the public authority. 16

policy is subject to a war exception clause the cover does not include losses "arising out of specific acts of the enemy or of the defence services".

*Other special exceptions.*—In respect of wilful damage, such damage, if attributable to the assured's own servants, is often excluded. So, too, may be mechanical or electrical breakdown, or something falling within the notion of mere failure or fracture. In respect of damage to tyres, road-bursts and punctures are sometimes excepted. There is often an express exception regarding injury to other property of the assured caused by the insured vehicle. Clauses excluding driving by named persons, or by those who have no licence or who are disqualified under a statute or statutory rule, are common. So, too, are conditions excluding the user of the vehicle for organised racing or speed-testing. In the case of particular vehicles there may be exceptions in the policy in respect of user not covered by a permit to ply for hire or reward.

The effect of a special exception was recently considered by the Privy Council in *Trickett v. Queensland Insurance, etc.*, [1936] 6 Comp. Cas. 26. The case is instructive also as indicating the limits within which it is safe to apply principles derived from maritime insurance to contracts of insurance appertaining to transit on land. The relative exception was thus worded: "*No liability shall attach . . . under this policy . . . while any motor vehicle in connection with which indemnity is granted under this policy . . . is being driven in a damaged or unsafe condition.*" The assured was killed, while driving the insured car, by a collision with a vehicle coming in the opposite direction. It had been found, as of fact, that the car's lights were not functioning just before the collision. For the claimants it had been argued that to bring the case within the exception, the car would have to be "unroadworthy", when it started on the journey: thus applying a principle borrowed from maritime law in regard to the "seaworthiness" of a ship: and certain *dicta* of Goddard, J., in *Barret v. London General Insurance Co.*, [1935] 1 K.B. 238, were relied upon. Their lordships of the Privy Council,<sup>1</sup> however, expressed themselves as "not able to assimilate . . . the position of a ship at sea with that of a motor car on land . . . For reasons which are too obvious to be stressed in detail, their lordships think the analogue imperfect and indeed misleading. They are of opinion that the argument based by the appellant on the identity of the conditions which govern the sea-worthiness of a ship at sea and road-worthiness of a car on land is unsound." They accepted the finding that the car was actually and *de presenti* unsafe to drive, because a necessary appliance was not functioning; and that it was driven after that state of affairs had developed. The facts were thus within the exception, and the claimants could not succeed.

*Conditions other than exceptions.*—Readers of previous Chapters of this treatise<sup>2</sup> will realise that conditions may be in the nature of warranties or they may be classified as affirmative or negative stipulations—the latter having the effect of exceptions; or that, again, they may be categorised as conditions precedent, conditions subsequent, or conditions concurrent. It is not necessary to enlarge further upon these distinctions. To keep within the scope of this treatise it must suffice to give examples of the application to motor vehicle insurance of principles already enunciated.

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does not apply to any vehicles taken over by acquisition or by His Majesty's Forces."

<sup>1</sup> Lords Atkin and Roche with Sir Sidney Rowlett.

<sup>2</sup> See Chapter II, pp. 38-41, *ante*.

*Breach of warranty.*—In *Sibai Hasan v. Guardian Assurance*, [1937] Comp. Cas. 409, the plaintiff had obtained an omnibus on the hire-purchase system. It was insured with the defendants. The policy contained a warranty that the vehicle would be used solely for the carriage of passengers. The plaintiff removed the body of the vehicle and used the chassis as an open lorry for the purpose of carrying a load of monkeys. In a suit to enforce a claim arising out of an accident to the chassis, which caught fire whilst being put to the above purpose, the user was held to be a breach of the warranty.

*Power of cancellation.*—It had been decided so far back as *Sun Fire Office v. Hart*, [1889] 14 A.C. 98, that a general condition reserving the power of cancellation by an insurance company is not necessarily void or subject to a condition of good cause shown. The reason for that view of the law was thus stated by Lord Watson: "There may be many circumstances calculated to beget in the mind of a fair and reasonable insurer a strong desire to terminate the policies, which it would be inconvenient to state and difficult to prove; and it must not be forgotten that the whole business of fire insurers consists in the issue of policies, and that they have no inducement, and are not likely, to curtail their business without sufficient cause. On the other hand the insured gets all the protection which he pays for, and when the policy is determined, can protect his own interest by effecting another insurance."

The contention that there was an implied condition that a clause allowing for cancellation would not be operative without some good and substantial cause stated, was raised in India in the case of *Chotirmull Hirachand v. Clive Insurance Co.*, A.I.R. [1927] Sind 116, which was a claim for return of premium on a policy of motor car insurance where the insurers had purported to cancel the policy. The plaintiff's contentions were negatived in reliance on *Hart's* case alluded to above.

*Prepayment of premium.*—In the case of *Equitable Fire & Accident v. Ching Wo Hong*, [1907] A.C. 96, the material facts were that the relative instrument contained a condition stipulating that the insurance would not take effect till the premium had been paid. The policy was issued before any payment of premium; and the plaintiff claimed under it without having made the requisite payment. It was argued that the insurers by delivering the policy before payment of premium must be taken to have waived the condition. The Privy Council held otherwise. "What was handed to the respondents" said their lordships "was the instrument with the stipulation in it". The effect, therefore, was that the respondents by reason of receiving that instrument had express notice of the stipulation. So far from the insurers thereby waiving the condition, the handing over of the document with this condition contained in it was evidence that the insurers would rely upon it. The stipulation not having been fulfilled, the risk did not attach, and the plaintiff could not recover.

This view was applied in India in *South British Insurance Co. v. Stenac*,<sup>1</sup> [1928] 52 Bom. 532—a case of motor vehicle insurance.

In a recent case in India a condition as to prepayment was held to have been waived, that being the only reasonable inference from the particular circumstances established. (*Ocean Accident & Guarantee Corp. v. Pathar*, A.I.R. [1935] Bom. 236.)

<sup>1</sup> The Court dissented from the decision in *Roberts v. Security Co.*, [1897] 1 Q.B. 111, and pointed out that its soundness had been doubted in *Ching Wo Hong's* case cited above.

**Right to enforce suit against third party.**—In another recent case (*British India General Insurance Co. v. Naik*, [1938] Comp. Cas. (Ins.) 65) decided in Bombay, it was held that where a clause in a motor insurance policy gives power to the insurers to enforce the legal rights of their assured in the latter's name against a third party, the clause represents merely an agreement between the insurer and his assured, and adds nothing to the rights of either party against the third person. From such a clause it cannot be deduced that a third party attains a right to sue the insurers. Similarly, where a policy provides that the insurer shall indemnify his assured against the latter's legal liabilities in respect of the death of, or bodily injury to, a passenger in the insured vehicle, such a clause is for the benefit of the assured and does not so operate as to make the passenger a beneficiary under an implied trust. This being so, a passenger who is a stranger to the contract of insurance cannot sue the insurers under the policy.

There seems not to have been cited to the Court the earlier case of *Vandepitte v. Preferred Accident Insurance Co. of New York* decided by the Privy Council and reported in [1933] A.C. 70.<sup>1</sup> In that case their lordships referred with approval to the rule of law as stated in the opinion pronounced by Lord Haldane in *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A.C. 847 at 853, in these words:—

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*."

The equitable principle which qualifies that rule of law was, in the same case and by the same high authority, stated to be that a party to a contract could constitute himself a trustee for a third party of a right under the contract, and thus confer such rights enforceable in equity on the third party. And in such a case the trustee can take steps to enforce performance to the beneficiary by the other contracting party, as he can in the case of other equitable rights. Should a trustee refuse so to institute a suit, the beneficiary may do so, joining the trustee as a defendant. But, as their lordships pointed out, in order to have grounds for relying upon the doctrine, the intention to constitute a trust must be affirmatively proved. Such an intention is not necessarily to be inferred from the more general words of the policy.

It is submitted that the foregoing statement of the law fully supports the conclusions arrived at by Norman, J., in the Bombay case cited.

**Making assured part-insurer.**—There is sometimes a stipulation that the assured shall be liable for some part of the damage, e.g., the first £5 of the sum recoverable under the policy. Such a stipulation was to be found in the policy discussed in *Morley v. Moore*, [1936] 2 K.B. 359. The material facts were that the insurers had paid £28 2s. 8d. being the value of the damage done, less the £5 for which under the policy the assured was himself liable. The part indemnity thus paid was in respect of damage done to the assured's car in a collision brought about by the negligence of the driver of the other colliding car. Having failed to obtain a full indemnity from his insurers, the assured sued the other

<sup>1</sup> The decision largely turned on the effect of specific provisions in certain British Columbian statutes. But the case is instructive with regard to the doctrine of "insurable interest" as applied to third-party risks.

party in tort for the full sum as damages, and recovered that sum by action in the county court. The tortfeasor appealed; and reliance was placed upon the alleged existence of an agreement between the plaintiff's insurers (who had paid up to the extent mentioned above) and the defendant's insurers. That agreement was of the character known in the profession as a "knock for knock" agreement. Its precise terms were not made known to the Court; but it was described as an arrangement by which each party to it undertook to pay his own assured and to discourage that assured from making any claim against the other party to the accident. The Court held that unless the policy expressly purported to bar the assured from so doing, he could not be prevented by any arrangements between the insurers from exercising his rights to sue the tortfeasor for damages; though, as the contract of insurance was one of indemnity, he must be taken to hold any damages obtained as for the use and benefit of his insurers, by virtue of the doctrine of subrogation.<sup>1</sup> Sir Boyd Merriman, P., observed in the course of his judgment that if, contrary to the opinion he had formed, the combined effect of a stipulation to be his own insurer for £5 and a "knock for knock" agreement between the two insurers were to prejudice seriously an insured person so as to prevent him from asserting his own legal rights he would wish to consider whether such an agreement<sup>2</sup> were not contrary to public policy.

*Suspension.*—As in other instances of property insurance, the policy may be so drawn as to suspend its operation without effecting a determination of the contract. Thus a motor vehicle covered by a policy on the road and in a named garage may not be protected during the time it be garaged elsewhere. In such circumstances the cover is said to be "suspended", the risk re-attaching so soon as the car is re-positioned under circumstances which bring it within the risks undertaken.

**Compulsory insurance of third-party risks.**—The reader's attention has already been directed to the reforms inaugurated by Chapter VIII of the Motor Vehicles Act, 1939. Although that Chapter does not come into force until the 1st of July, 1943, the far-reaching nature of its provisions needs some comment.

The draughtsman had before him the four principal statutes by which Parliament in England had sought to remedy the evils to which reference has been made earlier in this treatise.<sup>3</sup> The enactments alluded to are The Road Transport Lighting Act of 1927<sup>4</sup>, The Road Traffic

<sup>1</sup> This doctrine has been frequently referred to earlier in this treatise and explained in Chapter III, pp. 72-77, *ante*.

<sup>2</sup> Formerly insurers were zealous to see that their assured took steps against a tortfeasor, stipulating that such an action should not be compromised without their consent, or in any way to their prejudice. See *Horse, Carriage and General Insurance Co. v. Petch*, [1916] 33 T.L.R. 131. In a recent case in England (*In re Crocker, etc.*, [1936] 1 Ch. 696) damages had been awarded against an assured, whose insurers had exercised their right to conduct his defence and had nominated a firm of solicitors for the purpose. The assured, who was dissatisfied with the conduct of the case, demanded access to all papers relating to it which were then or had been in the custody, possession or power of the solicitors. This, at the instance of the insurers, the solicitors refused to give him. Clauson, J., however, made an order on them both to give discovery on oath and to give inspection, with all consequential rights as to note-taking and the provision of copies. See, later, *sub-nomine Groom v. Crocker*, [1939] 1 K.B. 194; and *Beacon Ins. Co. v. Langdale*, [1939] 4 All E.R. 204, where insurers were held entitled to settle the case and the assured bound to pay £5 towards such settlement.

<sup>3</sup> See pp. 483, 484, *ante*.

<sup>4</sup> 17 & 18 Geo. V, c. 37.

Act, 1930,<sup>1</sup> The Third Parties (Rights against Insurers) Act, 1930,<sup>2</sup> and The Road Traffic Act, 1934<sup>3</sup>. Chapter VIII of the Indian Statute, which consists of sections 93 to 111, has in several instances followed provisions in the last-named two statutes almost *totidem verbis*. Accordingly, English case-law in which the kindred provisions have been construed will have weight with the Courts in India as aids to interpretation of any corresponding passages in the Indian statute.

*Not applicable to certain vehicles.*—The provisions as to compulsory insurance against third-party risks do not apply to vehicles owned by the Central or a Provincial Government or a local authority (where the same has been exempted by notification) or a state-owned railway, when the vehicle is driven by a government servant in the course of his employment.

*Nature of insurance prescribed.*—The statute makes it a penal offence punishable with imprisonment which may extend to three months with or without a fine which may extend to Rs. 500, for any person, other than a mere passenger, to use, or to cause or allow any other person to use, a motor vehicle in any public place unless in relation to the use of that vehicle by that or some other person as the case may be, there is in force a policy of insurance against third-party risks and which otherwise complies with the requirements of the Chapter.<sup>4</sup> A mere paid servant using a vehicle as to which there is not in force the requisite insurance against third-party risks, is not within the mischief of these penal sanctions, unless he knows or has reason to believe that there is no such policy in force.

To comply with the other requirements alluded to, the policy must be one issued by an authorised insurer,<sup>5</sup> and which insures the person or classes of person specified in the policy to the extent specified in section 95 (2) against third-party liabilities arising out of the use of the vehicle in a public place. Sub-section (5) provides that notwithstanding anything elsewhere contained in any law, an insurer issuing a policy under the section shall be liable to indemnify the person or classes of person specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of person.

In *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E.R. 246, the effect of corresponding provisions in the Road Traffic Act, 1934, fell to be considered. The action was for a declaration<sup>6</sup> that the insurers were entitled to avoid a policy and a cover-note issued to the defendant, on the ground that these instruments were obtained by representations of fact, false in material particulars and/or by non-disclosure of material facts; and for a further declaration that they were not liable to indemnify either of the defendants in respect of third-party risks which might be alleged to have attached by reason of a named accident. Only one of the defendants appeared; and for him it was argued that under the Road Traffic Act, 1934, section 36 (4),<sup>7</sup> the insurers could not avoid their statutory liabilities in respect of third-party risks. In delivering judgment, granting both the declarations claimed, Branson, J., having

<sup>1</sup> 20 & 21 Geo. V, c. 25.

<sup>2</sup> 20 & 21 Geo. V, c. 43.

<sup>3</sup> 24 & 25 Geo. V, c. 50.

<sup>4</sup> Section 94 read with sec. 125.

<sup>5</sup> *I.e.*, one registered under the Insurance Act, 1938, and who has made and kept up the deposits as required by that statute.

<sup>6</sup> A right expressly conferred by sec. 10 (3) of the Act. There is no corresponding provision in the Indian statute.

<sup>7</sup> Corresponding to the provisions of sec. 95 (5) of the Indian statute.

found the facts in favour of the insurers, held that they must succeed. He called attention to the fact that to be within the statute the policy alleged to be in force must be one which "insures the person or classes of person specified in the policy, etc.". Here the learned Judge was calling attention to section 36 (1) (b), a clause which in all essentials is *totidem verbis* section 95 (1) (b) of the Indian statute. "A policy" said he "obtained by misrepresentation of material facts insures no one, and so cannot be held to be such a policy and, therefore, sub-section (4) does not apply to a policy so obtained". Relying upon the views expressed by Scrutton, L.J., in *McCormick v. National Motor and Accident Insurance Union*, [1934] 40 Comp. Cas. 76, at pages 84 and 85, he, too, saw no clear words in section 36 (4) "compelling him to hold that the legislature had thereby deprived an insurance company which had issued a policy under section 36 of the Road Traffic Act, 1934, of its common law rights in respect of the repudiation of liability".

*Powers of Provincial Governments.*—Wide powers are given to Provincial Governments to appoint a person or a body of persons to investigate and report on motor accidents involving death or bodily injury<sup>1</sup>; to bring co-operative societies within the scheme of Chapter VIII as if they were authorised insurers<sup>2</sup>; to make rules compelling motor vehicle owners, when applying for authority to use the vehicle, to establish that by the time the authority sought would come into operation there would be in force a policy complying with the Chapter, or that the vehicle was one which is exempted by the statute.<sup>3</sup> A Provincial Government, moreover, may prescribe that a policy in order to comply with the Chapter must expressly cover any liability arising under the Workmen's Compensation Act, 1923, in respect of the death of or bodily injury to, any paid servant when engaged in driving or otherwise being in attendance on or being carried in a motor vehicle.<sup>4</sup>

*Statutory limitations.*—The statute lays down important limitations on the extent of the cover requisite for compliance with the intentions of Chapter VIII.

In the first place, unless the Provincial Government has exercised its powers to insist upon cover in respect of liabilities under the Workmen's Compensation Act, 1923, the requisite policy is not required to cover liabilities in respect of a servant, where the resulting death or injury arises out of and in the course of his employment; nor need it cover liability in respect of death or bodily injury to users of the vehicle unless they be "*passengers carried for hire or reward or by reason of or in pursuance of a contract of employment . . .*".

The words italicized above are taken almost *totidem verbis* from a corresponding clause in a proviso to section 36 (1) of the Road Traffic Act, 1934, and they fell to be construed in *Izzard v. The Universal Insurance Co., Ltd.*, finally decided by the House of Lords in [1937] A.C. 773. It was sought in that case to suggest that the words "*in pursuance of a contract of employment*" should be read as if they meant "contract of employment with the insured". This contention the House negatived. Thus, a policy to comply with the intentions and provisions of Chapter VIII must cover persons who are travelling in pursuance of any contract of employment.

A third term of the proviso makes it not a matter of obligation to cover a contractual liability as such.

<sup>1</sup> Sec. 110.

<sup>2</sup> Sec. 107.

<sup>3</sup> Sec. 108.

<sup>4</sup> Sec. 95 (3).

Certain monetary limitations are imposed by section 95 (2) in respect of vehicles used or adapted for the carriage of goods (when the limit is Rs. 20,000); and where the vehicle is one in which passengers are carried for hire or reward or in pursuance of a contract of employment, a scale is prescribed whereby the liability is graduated from Rs. 2,000 to Rs. 20,000.

No fixed limit of monetary liability is prescribed in respect of similar insurances relating to vehicles of any other class.

*The statutory certificate.*—The scheme of the Act obliges insurers to issue a certificate of insurance or a cover-note in the prescribed form.<sup>1</sup> Section 95 (4), however, provides that the certificate or cover-note must contain "the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters".<sup>2</sup>

*Third party's rights against insurers.*—The most important provisions are those contained in section 96, which impose upon an insurer the duty of satisfying judgments against his assured in respect of third-party claims. The effect of these provisions is to compel him to satisfy those claims, notwithstanding that he may be entitled to avoid or cancel the policy or may in fact have already done so. The extraordinary legal anomalies thus created were to a large extent overcome, in the corresponding English legislation, by the rights given to the insurer under section 10 (3) of the English Road Traffic Act, 1934.

The chief defect of the provisions of the Indian statute remarked upon is that while, so far as they go, they are modelled on sections 10 and 12 of the Road Traffic Act, 1934, they fail to secure to insurers in India any protection corresponding to that given by section 10 (3) to insurers in England.

The object aimed at by the Road Traffic Act of 1930 and the Third Parties (Rights against Insurers) Act of the same year was to effect a statutory subrogation of injured persons to the rights of the assured under a motor vehicle policy covering third-party risks. Thus, as in all instances of subrogation, the party subrogated (who may compendiously be referred to as the "surrogate") was permitted to "stand in the shoes" of the other party to the contract, namely the assured, and so could sue the insurer direct. Owing to unexpected difficulties in regard to the interpretation and effect of section 38 of the Road Traffic Act, 1930, there was passed four years later the Road Traffic Act, 1934 (24 & 25 Geo. V, c. 50) whereby, in certain circumstances, insurers were compulsorily placed in the position of judgment-debtors to any third party subrogated to the rights of their assured. But the promoters of this new legislation showed themselves not unmindful of the jurisprudential conception of a right arising under the doctrine of subrogation, namely that a surrogate can have no better right than has he from whom he derives it.<sup>3</sup>

Accordingly, by section 10 (3) of the last-named English statute, an insurer is given a right and an opportunity to sue for and obtain a declaration that, apart from any condition in the policy, he is entitled to avoid the contract on grounds of non-disclosure of a material fact or of

<sup>1</sup> The schedule provides no form. Proper forms may be expected eventually by virtue of the powers taken under sec. 111 (2).

<sup>2</sup> Section 106 (1) entitles a police officer in uniform to demand production of the requisite certificate or cover-note which thus, like a driving licence, will have to be upon the vehicle when the latter is in use.

<sup>3</sup> See the explanation of the doctrine in Chapter III, pp. 72-77, *ante*.

some representation false in a material particular. Armed with such a declaration, if obtained in time, an insurer is no longer answerable to a judgment obtained by a third party.<sup>1</sup> This is in keeping with sound doctrine. For if there is no right which the assured himself can enforce against the insurer, there is, *a fortiori*, none of which his surrogate can avail himself. To have enacted section 96 of the Motor Vehicles Act, 1939, as has the Indian legislature, without providing the insurer with any statutory machinery for testing the validity of the basic contract, is to do violence to a long-accepted principle of our law, with inevitable injustice to both parties to the contract. For it can scarcely be denied that in many cases the exiguous rights of recovery offered by sub-sections (3) and (4) of section 96 would in a great many cases be found wholly infructuous.<sup>2</sup>

Anyhow the provisions of section 96, when read with section 95 (1) as interpreted in the light of the recent judgment in *Sutherland's case* cited above, would appear to involve a repugnancy.

*Insolvency, winding up, settlement with creditors.*—By section 101 it is provided that an assured's insolvency is not to affect his liabilities in respect of claims by third parties within the meaning of the Chapter; while section 97 confers on such third parties the right to sue the insurer where the assured has become insolvent or arrived at an arrangement with his ordinary creditors. A similar right may be exercised where the insurer, if a company, goes into liquidation: but not if the winding-up be voluntary and merely for the purposes of reconstruction or amalgamation.

Section 99 invalidates any settlement made between an insurer and his assured affecting the claim of, or liability to, a third person unless that person shall have been a party to the settlement.

*Duty to provide information.*—By section 98 a duty is imposed on everyone against whom a third-party claim may be made, to state on demand by the third party or by anyone on the latter's behalf, whether he be insured within the meaning of the Chapter, or would have been so insured had not the insurer cancelled or avoided the relative policy. The person so interrogated must also give the relative particulars appearing in any certificate issued him under the Chapter.

*Re-insurance.*—By section 100 the position of re-insurers is saved from the incident of such reference to "third-party liabilities" as are made in or implied by the terms of sections 97, 98 and 99 of the Act.

*Effect of death on certain causes of action.*—The provisions of section 102 of the Motor Vehicles Act, 1939, are particularly important. They are as follows:—

<sup>1</sup> But the policy subsists till such a declaration shall have been obtained. (*Goodbarne v. Buck*, [1939] 4 All E.R. 107.)

<sup>2</sup> Section 96, as it stands, would, moreover, seem to place insurers in so dangerous a position in respect of claims made against their assured by third parties that it would not be surprising if insurances of the kind required by the Act were not forthcoming by the time Chapter VIII is due to come into force. There is not, and could not be, either under the statute or under the general law, any power to compel insurers to accept the position created by section 96. It happens that the Chapter is unworkable without their co-operation; for the penal sanctions could not be applied to the owners or to the drivers of motor vehicles if the requisite insurances were unobtainable. In these circumstances it is permissible to envisage a drastic amendment of Chapter VIII before the 1st of July, 1943, and to believe that, pending some such amendment, it were premature to say much more of that part of the statute than is offered to the reader in the present Chapter.

"Notwithstanding anything contained in section 306 of the Indian Succession Act, 1925,<sup>1</sup> the death of a person in whose favour a certificate of insurance or cover-note had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this Chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer."

## 8. Negligence.

In no branch of insurance business is some grasp of the current law relating to Negligence of greater importance than it is in vehicular insurance. In Europe and in the Americas, as also in the British Dominions, a very large volume of contentious causes belongs to the category of "running-down" cases.<sup>2</sup>

Apart from conduct sounding as a penal offence, to give a cause of action at law in respect of an accident of this class the facts must bring the case within the concept of that kind of tort<sup>3</sup> which is known as "actionable negligence". The topics of negligence and of breach of duty have already arisen much earlier in this treatise and to the observations made in Chapter VI under the respective heads of Negligence and Misconduct the reader is therefore referred.<sup>4</sup> One further comment may, however, be found useful in the present context.

During the greater part of the nineteenth century and for some time into the present century, English and Colonial judges in their analyses of the events leading up to the particular occurrence in relation to which someone was being sued in tort, had become more or less habituated to arranging the component parts of the so-called "chain of causation" in the order of time. In the Canadian courts particularly, phraseology was commonly used of negligence with a like intent whereby distinctions were made between what was styled "primary" or "original" negligence, and "ultimate" or "resultant" negligence.<sup>5</sup> The epithets adopted by

<sup>1</sup> Section 306 of the Indian Succession Act (XXXIX of 1925) is in the following terms:—

"All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

### Illustrations.

(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(ii) A sues for divorce. A dies. The cause of action does not survive to his representative."

<sup>2</sup> In America the law and practice relating to such cases has a literature of its own. In Asia and India, where there are far fewer power vehicles to the square mile of inhabited country, the systematic study of running-down accidents is very little pursued.

<sup>3</sup> A word derived through the French from the Latin. The original notion is that of "twisting" something, and thus producing hurt or harm. The "tortfeasor" is he who does the harm.

<sup>4</sup> See pp. 309-313, 318 and 319, *ante*.

<sup>5</sup> *Brenner v. Toronto Ry. Co.*, [1907] 13 Ont. L.R. 423; the same case when in the Supreme Court, [1908] 40, Can. S.C.R. 540; *Rice v. Toronto Ry. Co.*, [1910] 22 Ont. L.R. 446; and *Snow v. Crow's Nest Pass Coal Co.*, [1907] 13 B.C. Rep. 145, present examples of what is thus alluded to.

eminent judges in England as applied to the concept of cause were many, e.g., "efficient", "effective", "real", "proximate", "direct", "decisive", "immediate", "occasional", "remote", "contributory", "inducive"; while there is to be noticed in the relative case-law such phrases as "*causa causans*" and "*causa sine qua non*".

A turning point was reached when Lord Sumner delivered the judgment of the Privy Council<sup>1</sup> in *British Columbia Electric Ry. Co. v. Loach*, [1916] A.C. 719. After speaking with surprise of the many epithets which eminent judges had applied to the cause which had to be ascertained for the judicial purpose of determining liability, and of the many more applied to other acts and incidents which for that purpose were not the cause at all, the judgment proceeded. "No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used; but the repetition of terms without examination in other cases has often led to confusion and it might be better, after pointing out that the enquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification."

In *Smith v. Harris*, [1939] 3 All E.R. 96, a recent case in England arising out of a collision between a number of motor cyclists, the Court of Appeal adopted what may be called the modern approach to the problem. That approach, dating really from *British Columbia v. Loach*, *supra*, is well exemplified by a passage from the opinion of Lord Wright delivered before the House of Lords in *The Heranger*, [1939] A.C. 94, 101. The question being whether in the particular instance—a collision in the River Thames—one ship ought or ought not to have reversed her engines. "I do not think" he said "that a question of this character can properly be treated as a question of law. The Court of Appeal recently held in *Tidy v. Battman*, [1934] 1 K.B. 319, a common law action for negligence in a motor-car collision, that it was not proper to set aside the finding of a jury by reference to a rule of conduct which it was said was a rule generally binding and a rule of law. I may venture to quote what I said in that case in the Court of Appeal: 'It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts.' In all these cases of negligence, whether on sea or on land, the decision must be arrived at as a question of fact on all the circumstances of each case. Cases and precedents may perhaps help sometimes, but they are in truth a very doubtful guide at best in deciding any particular case." With the same high authority, Scott, L.J., in *Smith v. Harris*, *supra*, expressed himself in agreement when delivering judgment in *The Eurymedon*, [1938] P. 41, 58. In that case his lordship confessed to a feeling "that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense. I respectfully agree" he went on "with a phrase of Lord Wright in *McLean v. Bell*, [1932] 147 L.T. 262, at p. 264: 'The decision, however, of the case must turn not simply on causation, but on responsibility.' When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act of omission in point of time is of necessity not only the last link in the chain of causation, but the determining factor

<sup>1</sup> Viscount Haldane, with Lords Parker and Sumner.

in the result, since *ex hypothesi*, but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link."

To summarise, one may perhaps say that what is here insisted upon when arranging a chain of events is the replacement of the order of time by the order of importance.<sup>1</sup>

In dealing with the facts of the particular case, Scott, L.J., said something upon the topic of speed which comes very near to stating a principle. The material circumstance was that a party of motor cyclists were upon the road in the enjoyment of a game known as a "treasure hunt". They were in a single line on the same road at relatively short intervals. The speed of the column, as at the material time, was anything between twenty and twenty-five miles per hour. The leader braked without warning. And confusion and collision followed between the second, third and fourth cyclists in the line, causing injury to a person who had been riding on one of the pillions. The Lord Justice, at page 963, spoke of it as being essential in a column of motor cycles thus moving "that the speed should be so limited as to make it quite certain that each one, with the interval at which he is in fact following, can stop in time to avoid a predecessor, in the case of any breakdown or sudden stop of any sort. That is a duty which is continuing all the time; it is operating at the moment when one of those ahead suddenly stops or breaks down, and if that accident is caused by the negligence of that rider, then obviously his negligence is the cause of the difficulties in which all the followers find themselves."

A case based on Negligence (*Hall v. Wilson*, [1939] 4 All E.R. 85) indicates how the risk of war may affect the assessment of damages.<sup>2</sup>

In *Goddard v. Frew*, [1939] 4 All E.R. 358, a policy covering "all losses . . . by reason of any act, neglect, omission . . . or error" was held (i) an indemnity and not a fidelity guarantee, and (ii) not to cover an embezzlement.

## 9. War.

War constitutes so great an interruption in the life of a people that it is small wonder if, as readers of earlier Chapters of this treatise will have noted, risks to which a state of war gives rise are not within the ordinary everyday contract of insurance: that, to use more technical language, they are regarded as "excepted perils".

**The beginning and end of a war.**—In the past, nice questions have often arisen as to what condition of things should be held, as a matter of law, to amount to a state of war. The international lawyer<sup>3</sup> looked for a formal Declaration, passing from the country which purposed to open hostilities to the country which was alleged to have made such hostilities imperative; for the severance of diplomatic relations, or, at least, for an *ultimatum* which by its form might render any other

<sup>1</sup> Pursuing this path, may not so agreeable an escape from the disconcerting subtleties of law deliver us the sooner to the more intricate subtleties of nature?

<sup>2</sup> See p. 500, *post*.

<sup>3</sup> Meaning the practitioner in, or exponent of, so-called "international" law—the *jus inter gentes* or rule of law by which two or more nations have agreed to be bound in regard to their common dealings with one another. This *jus inter gentes* is not to be confused (as it sometimes is) with the *jus gentium* of Roman or mediæval jurisprudence.

declaration unnecessary, since in terms it might warn the government addressed that if a demand previously or thereby, made or expressly referred to, were not to be met within a period of time named in the communication, military measures would be taken to enforce compliance. The particular phraseology used in such communications had less juristic importance than the clear notice of an intention to resort to arms in the stated circumstances. The international lawyer would rely upon the fact of the expiry of the time-limit mentioned in such an ultimatum, or upon a declaration in explicit language that the one country considered itself as from a particular date and hour at war with the other, as the primary evidence required for determining when a state of war came into actual being. He did so because, till yesterday, the recognition of a public moral duty not to pass from a state of peace to one of aggression without some such authoritative and explicit warning had come to be regarded as one of the marks of a civilized government.

Unhappily, however, the twentieth century has offered more than one example of a government claiming to represent and control a civilized community, launching a carefully prepared attack on a neighbouring and friendly people without any such preliminary declaration of its intention,—in short, wholly in defiance of the long-accepted dictates of public morality.

In order to keep the peculiarly unexpected risks attendant upon conduct of this kind outside the scope of ordinary insurance contracts, the modern draughtsmen of "exception" clauses have been obliged to add to the word "war" others, *e.g.*, "hostilities" and "warlike operations". It may thus be said that henceforward the determination of such a question as when or whether in a given condition of things a state of war may be said to have begun will less often involve delicate legal distinctions, but will be regarded as once and for all a matter of crude fact.

But to decide when a war may be said, in a juridical sense, to have ended may still involve nice questions of law: witness the facts in *Kotzias v. Tyser*, [1920] 2 K.B. 69.

At the outbreak of war in 1914 the plaintiff in that case was carrying on business as a Greek merchant. He was prevented by the war from continuing his business, but was desirous of resuming it when the war should end. In the meantime he took steps to protect himself by insurance against the risk of the war continuing. He took out a policy on the 2nd November, 1918, which was subscribed by a number of underwriters for the aggregate total of £3,400, "in the event of peace between Great Britain and Germany not being concluded on or before the 30th of June, 1919". Although the treaty of peace was signed at Versailles on the 28th of June, 1919, between the Allied and Associated powers, including Great Britain, on the one hand and Germany on the other, ratifications of that treaty by the High Contracting Parties thereto were not exchanged until the 10th of January, 1920. Roche, J., held that the word "conclude" in the policy should not be interpreted in the way contended by the defendants: the general rule of international law being that peace is not concluded until any treaty made becomes finally binding upon the belligerents; which stage cannot be reached until ratifications have been exchanged between them. The learned judge also relied upon a special statute, the Termination of the Present War Act, 1918, which declared that the war should be treated as having ended on some date as nearly as may be the date of the exchange or deposit of Ratifications of the Treaty of Peace. The plaintiff succeeded.

**Insurable interest.**—That interruption of normal life which is now-a-days the first-felt result of a state of war, or even of a threat of the same, constitutes in itself a peril in respect of which practically every citizen may suffer commercial loss and damage, or at least stand to do so; while another, who may actually or apparently have prospered under such a state, or who has at last achieved stability by a prolongation of those conditions, as obviously stands to lose by their sudden collapse. Against the effect of such violent changes over from a state of peace to one of war, or from war to peace again, men may and do insure; and it is in regard to insurances of this order that important matters of law sometimes arise, differing in kind from the sort of questions which have to be determined in other forms of casualty insurance. The tests for insurable interest in respect of war risks do not differ from what have been described earlier in this treatise in relation to other branches of insurance business.<sup>1</sup> The scale of the present treatise precludes their restatement save that, first and foremost the apprehended loss must be pecuniary in effect.

**Causation.**—As in a policy intended to exclude war perils, so in one designed to cover them, much must necessarily depend upon how far the phraseology used succeeds in conveying plainly and unambiguously the intention of the parties; and secondly whether that intention be in fact to include losses *indirectly* as well as *directly* resulting from a state of war or of warlike conditions. In other words, do the parties to the contract show themselves to have intended that the doctrine of “proximate cause only” should apply to the insurance, or did they mean to contract out of that rule, and to accept war indirectly causing loss as one of the perils to be covered by the policy. An example of a case in which that question arose is *Coxe v. Employers’ Liability Assurance, etc.*, [1916] 2 K.B. 629, fully discussed in an earlier Chapter of this treatise.<sup>2</sup>

In *Curtis & Sons v. Mathews*, [1919] 1 K.B. 425, C.A., the policy covered “risk of loss and/or damage, directly caused by war, bombardment, military or usurped power, or by aerial craft (hostile or otherwise) including bombs, shells, and/or missiles, dropped or thrown therefrom, or discharged thereat, and fire and/or explosion directly caused by any of the foregoing”. Military bombardment by Crown forces against local insurgents in Dublin had resulted in a fire which spread and destroyed the property at risk. It was held, on appeal, affirming the Court of first instance, that the insurers were liable, the *ratio decidendi* being that the strife amounted to warfare and had involved bombardment. Nearly twenty years earlier had been tried the case of *Molinos de Arroz v. Mumford*, [1900] 16 T.L.R. 469, where the risk undertaken was expressed as “loss or damage directly caused by war, revolution, civil commotion, and/or hostilities and fire-risks excluded by fire insurance companies’ policy”. The material event was the seizure of rice by insurgent forces in the Philippine Islands. Although there was no use of the word “indirectly”, the necessity of giving to the operative words of the policy a sufficiently broad construe so as reasonably to interpret the intentions of the parties, was pointed out by Bigham, J., in the following passage, at page 469: “In looking at the cause of the loss one must not confine oneself to the immediate physical consequence, some act of violence committed in the course of war. The proper way is to remember that there was a condition of things in existence which could be described as a state of war, and the object of the plaintiffs was

<sup>1</sup> See pp. 66-72, *ante*.

<sup>2</sup> See Chapter VII, pp. 420, 421, *ante*.

to protect themselves, and of the defendant to insure the plaintiffs, against the consequences of that state of things; and one of the direct consequences of that state of things was that the plaintiffs' rice was taken from them against their will."

It is well to remember that the condition of things which, in time-honoured forms, of Lloyd's and most other marine policies is contemplated by the phrase "restraint of princes" includes an act of war (*Nigel Gold Mining Co. v. Hoade*, [1901] 2 K.B. 849), and that a declaration of war on the part of His Britannic Majesty, which had the effect of rendering a particular voyage in the circumstances illegal, has been held to amount to a "restraint of princes".<sup>1</sup> (*British & Foreign Marine Ins. Co. v. Sanday and Co.*, [1916] A.C. 650.) It is thus not strictly accurate to say<sup>2</sup> that in every policy of insurance against risks wherein losses to be ascribed to war or warlike operations have been undertaken, the rule as to *proxima non remota causa* of necessity applies: the truth being that it is in every case a matter of construction as to how far this general rule relating to contracts of insurance was intended by the parties to be applied to the arrangements between them.

*War or threat of war, effect on assessment of damages.*—The High Court in England has recently decided (*Hall v. Wilson*, [1939] 4 All E.R. 85) that in assessing damages under the Fatal Accidents Act, 1846,<sup>3</sup> it is proper to take into account the possibility of a person being killed in the war, as a member of the fighting forces if he be of military age, or as a result of air raids. This deduction is to be made even if—as in the particular instance—the person was killed before the commencement of a war. The contention thus accepted is novel.

*Workmen's employment.*—The effect of conditions of war or of warlike operations upon workmen's compensation problems may often involve nice questions of interpretation, when old difficulties concerning what may properly fall within the phrase "out of" and/or "in the course of" the employment, present themselves to some extent in a new light.

Consider, in this connection, the cases of *Cooper v. N.E. Ry. Co.*, [1915] 85 L.J. K.B. 187, decided by the Court of Appeal in England shortly after the commencement of the European war of 1914–18, and *Bird v. Keep*, [1918] 2 K.B. 692, decided (by the same Court) at its close. In the first of these cases an engine driver on ordinary shunting duty was injured by a piece of shell during the bombardment of an English port by a German cruiser. The Court held the injury to have arisen "in the course of" but not "out of" his employment, the *ratio decidendi* being that he was not in the same position as were those in that part of the town singled out for bombardment. In the last of the two cases alluded to, all the workmen employed in a certain warehouse containing particularly inflammable material were regarded on that ground as peculiarly exposed to perils incidental to war; and injury to one of them when so circumstanced was held to arise "both out of and in the course of" his employment. Such was the effect, perhaps, on the judicial mind of an increased aerial activity affecting the industrial centres of England coupled with the particular contents of the premises alluded to in the action.

<sup>1</sup> These words are, in most modern policies, followed by the words "or peoples, military or usurped power", see Chapter IV, p. 153, *ante*.

<sup>2</sup> As some writers have said.

<sup>3</sup> Commonly called Lord Campbell's Act. See the brief commentary on this Act and the analogous legislation in India in Chapter II, pp. 44, 45, *ante*.

## CHAPTER IX

### THE INSURANCE ACT, 1938

### GOVERNMENTAL CONTROL OF INSURANCE UNDERTAKINGS IN BRITISH INDIA

#### I

1. Preliminary :—The policy of the Law—The Superintendent of Insurance—Supervision by Courts of Justice—Special provisions concerning Provident Societies, Mutual Insurance Companies, and Co-operative Life Insurance Societies. 2. Certain Statutory Definitions :—“ Insurer ”—“ Insurance Company ”—“ Mutual Insurance Company ”—“ Co-operative Life Insurance Society ”—“ Provident Society ”—“ Life Insurance Business ”—“ Policy-holder ”—“ Manager ” and “ Officer ”—“ Managing Agents ”—“ Approved securities ”—“ Prescribed ”—“ Certified ”—“ Court ”. 3. Certain statutory Conditions :—Working capital—Compulsory Deposit—Compulsory Registration—Compulsory Investment—Employment of Licensed Insurance Agents—Conditions touching a Licence—Obtaining and renewing Licences—Cancellation—Register of Agents—Appeals—Directorate of Life Insurance Companies. 4. Certain statutory prohibitions :—Business on the dividing principle—Managing Agents—Minimum limits for annuities and other benefits—Loans and advances to Directors, Partners and others—Restriction on Dividends and bonuses—Prohibition of Rebates—Prohibition of cessation of payment of renewal commission—Remuneration generally. 5. Reciprocity :—Statutory aids. 6. Deposits :—Graduated Scale—Market Value of Securities—Substitution of Securities—Investment—Transfer of Securities—Deposit for one class condition precedent to commencing business in another—Nature and Operation of Deposit Account—Refund of Deposit. 7. The Trade name :—Principles of Law—Equitable Jurisdiction to protect names—Statutory prohibitions—Change of Name—Appeal. 8. Registration :—Preliminaries to Application—In the case of :—(a) Corporations—Registration under Companies Act—A. Indian Corporations—B. British Corporations—C. Other Foreign Corporations ; (b) Partnership firms and Unincorporated bodies ; (c) Lloyd's Local Agents ; (d) Individual Proprietary concerns—Deposits when and how to be made—Documents to accompany the application—The prescribed fee. 9. The Certificate of Registration :—When it may be refused or postponed—When obligatory—Appeal. 10. Penal sanctions. 11. Exemptions. 12. Rules.

#### 1. Preliminary

In the present chapter an attempt is made to indicate, in broad outline, the measures which have recently been devised for the control of insurance undertakings in British India. In the second place, the reader is offered a statement in outline of those conditions which are precedent to the acquisition of a right to carry on insurance business in British India within the law of the land.

In the present chapter, unless otherwise plainly indicated, the words "the Act" or "the Statute" must be understood to have reference to the Indian Insurance Act (IV of 1938).<sup>1</sup>

The policy of the law in India is so to control all commercial enterprise in the nature of insurance in this land as to afford the maximum protection to policy-holders generally, while at the same time giving as much protection to indigenous insurance undertakings as is compatible with fair treatment of that large amount of foreign enterprise through which, after all, insurance as an aid to modern commerce and to modern domestic life in India, has been brought to these shores.

To that end, the Insurance Act, 1938, has created a machine whereby such control is to be achieved. It places that control in the hands of the Government of India for the time being. In the Act, that Government, in conformity with the Government of India Act, 1935, is throughout referred to as the Central Government. The Act extends to the whole of British India.<sup>2</sup> The words "British India" as used in the Act, must, it would seem, be regarded as co-extensive only with what has been understood as comprehended by those words wherever used in the statute law of the land since Queen Victoria's proclamation of 1858. There is no provision in the Act for extending it by notification or otherwise to a Federated India.

**The Superintendent of Insurance.**—The statute creates a special functionary styled the Superintendent of Insurance to whom is entrusted the whole of the administrative and some part of the judicial duties which the Act contemplates. The Superintendent of Insurance is to be appointed by the Central Government. One statutory qualification is prescribed. He must be a qualified actuary.<sup>3</sup>

**Supervision by Courts of Justice.**—The large bureaucratic powers which are thus conferred upon the Central Government are in certain important respects subject to the supervision of the Courts of Law. That supervision, for reasons hereinafter to be shown, will not, it is submitted, be quite as uniform as the public interest would seem to demand. Such lack of uniformity, however, is not directly referable to any provisions of the Insurance Act, 1938, or to any *lacuna* therein; but rather to a pre-existing disparity in the powers conferred upon the several High Courts by their respective Letters Patent. Fortunately, so far as the powers vested in the subordinate judiciary be concerned, a fair measure of uniformity prevails.

Inasmuch as the conditions obtaining in India prior to the passing of the Insurance Act, 1938, exhibited insurance undertakings as, here owned by a single individual or by a partnership concern, there by a Joint Stock Company, or, again, by an unincorporated association of individuals, the statute has been so framed as to bring within the ambit of the controlling officer's powers every one who, in any recognisable sense, was engaged in, or who was carrying on business in insurance at the date when the Act became operative, i.e., on the 1st July, 1939. The Act, further, compels everyone thereafter seeking to engage himself in or to carry on such business in British India, to bring himself within

<sup>1</sup> The Act as amended by Act XI of 1939 is reprinted as Appendix I to the present treatise. The Statutory Rules, styled the Insurance Rules, 1939, are reprinted as Appendix II.

<sup>2</sup> Sec. 1 (2).

<sup>3</sup> Sec. 2 (15), and Rule 3 of the Insurance Rules, 1939. (See Appendix II, p. xc, *post*.)

those conditions prescribed by the Act without which the carrying on of insurance business in British India is henceforth made illegal.

The expression "carrying on Insurance business" in the definitive section 2 (9) (a) and the expression "carrying on the business of Insurance" in sub-clause (b) of the same sub-section have yet to be judicially interpreted. It is submitted that to give effect to the intentions of the Legislature, which are to be gathered from the language of the statute read as a whole, these expressions should be given a wide interpretation; and that a certain amount of Indian case-law, wherein it has been held, upon the construction of certain Municipal Statutes, that insurance undertakings having no branch or offices of their own, but operating through other persons or undertakings as their agents within the Municipal limits concerned, are not amenable to municipal taxation on the ground of being "keepers of a place of business" or "doing business" within the Municipal limits, ought not to be applied so as to defeat the intentions of the Legislature as expressed in the statute.

Of the class of decisions so referred to may be cited: *Corporation of Calcutta v. The Standard Marine Insurance Co.*, [1895] 22 Cal. 581; *The Municipal Council, Coconada v. The Royal Insurance Co. of Liverpool*, [1897] 21 Mad. 5; and *The Municipal Council, Coconada v. The Standard Life Assurance Co.*, [1900] 34 Mad. 205.

By the scheme of the Act, special provisions are enacted for the control of Mutual Insurance Companies, Co-operative Life Insurance Societies, and those Provident Societies of which mention is made in Parts III and IV of the statute.

Conformable to that arrangement, it is proposed in the present treatise to deal first with that part of the machinery provided by the Act which concerns insurance undertakings other than Mutual Insurance Companies, Co-operative Life Insurance Societies, and Provident Societies, properly so called.

To enable the reader to appreciate the full import of the statutory measures immediately to be described certain of the definitions appearing in section 2 of the Act must first be explained.

## 2. Certain Statutory Definitions

The "*Insurer*" under the Act.—To entitle any "person"—using that word in the widest possible sense known to the law—to engage in insurance business, he must either be an "insurer"<sup>1</sup> or an "insurance agent"<sup>2</sup> within the meaning of the Act. No "insurer" is permitted to engage in the business of insurance in British India who has not become a registered insurer and obtained a certificate<sup>3</sup> as such, in the manner prescribed by the Act; and no "insurance agent" is permitted to act as such who does not hold the requisite licence so to act.<sup>4</sup>

An exhaustive definition of the word "insurer"<sup>1</sup> as used in the statute is attempted in section 2 (9). It is perhaps not too happily worded; and for the layman, at any rate, makes somewhat confusing reading. It is to be collected from it, however, that an "insurer"<sup>1</sup> is primarily one who carries on the business of Insurance.

It is evident from the definition of "Insurance Agent"<sup>2</sup> that he whose occupation is the soliciting or procuring of insurance business for reward is not an "insurer" within the meaning of the Act. Such a

<sup>1</sup> Sec. 2 (9).

<sup>2</sup> Sec. 2 (10).

<sup>3</sup> Sec. 3.

<sup>4</sup> Sec. 42.

mere agent is, indeed, expressly excluded from the definition. On the other hand, local agents in India for underwriters who are members of the Society of Lloyd's are expressly brought within the category of "Insurers".<sup>1</sup> This is because, by virtue of their agreement with their principals, they have power themselves to issue protection notes, cover-notes or other documents for a like purpose, which are binding upon the underwriters they represent. It is to be noted, that a Provident Society to which the provisions of Part III of the Act apply, is expressly excluded from the definition of "Insurer". The following at any rate are "Insurers" within the meaning of the Act:—

(1) Any individual, being a local agent in British India representing an underwriter who is a member of the Society of Lloyd's, between whom and such local agent there is a contract whereby such local agent may issue protection notes, cover-notes or other documents on behalf of the underwriter. Any such agency, if carried on by a company incorporated in British India or elsewhere or by a partnership firm will also be within the definition.

(2) Any other individual carrying on insurance business, who either carries on that business in British India or who, carrying on such business elsewhere, has yet his principal place of business in British India or has his domicile in British India or who, with the object of obtaining such business employs a representative or maintains a place of business in British India.

(3) Any partnership firm carrying on insurance business in British India, which either has its principal place of business in British India or, having that principal place of business elsewhere, whose members are yet domiciled in British India or which otherwise acts as in (2) above.

(4) Any other unincorporated body of individuals carrying on insurance business in British India or which carrying on that business elsewhere, has yet its principal place of business in British India, or whose members are domiciled in British India or which otherwise acts as in (1) or (2) above.

(5) Any body corporate incorporated under any law for the time being in force in British India and carrying on the business of insurance.

(6) Any body corporate incorporated under any law for the time being in force in British India, which stands towards any other incorporated body included in the description given in (5) above, in the relation of a subsidiary company, as the same is defined by section 2 (2) of the Indian Companies Act, 1913.<sup>2</sup>

(7) Any other body corporate incorporated under the law of any country other than British India carrying on insurance business in British India, whether having its principal place of business in India or in the country of its origin,<sup>3</sup> or which employs a representative or keeps a place of business in British India.

<sup>1</sup> Sec. 2 (9) (c).

<sup>2</sup> In this treatise every reference to the "Companies Act" is to the Indian Companies Act (VII of 1913) as amended up to 1938. See for that Act Butterworth's Encyclopædia of the General Acts & Codes of India, Vol. 4, pp. 228, *et seq.*

<sup>3</sup> Included in the definition of an "Insurer" under sec. 2 (9) (a) is a foreign corporation which either "has its principal place of business in British India or is domiciled there". In the law of England, as also by International law, the domicile of a trading corporation is regarded as the country where it has its principal place of business, i.e., where its administrative affairs are carried on. See *Dacey's Conflict of Laws*, 4th Ed., p. 151, and cases there cited.

It will thus be seen that a foreign insurance undertaking, whether the property of an individual or of a partnership, or vested in an unincorporated association of individuals or in the shareholders of a Corporation (such as a Joint Stock Company) is, by the definitive terms of the Act, an "insurer" for the purposes of the Act, so long as the undertaking concerned is carrying on insurance business in British India. Likewise will an Indian insurance undertaking, however owned, be an "insurer", within the meaning of the Act, if it carries on its business in British India, or, carrying on that business elsewhere, yet has a place of business or a representative in British India, or, in the case of individuals, partnership firms, or unincorporated associations, when the proprietor or proprietors are domiciled in British India.

Lastly, an Insurance Company is defined as "any insurer being a company, association or partnership which may be wound up under the Indian Companies Act, 1913, or to which the Indian Partnership Act, 1932, applies."<sup>1</sup>

Thus a Hindu Joint Family, if its business be insurance, will be an "insurer", not upon the ground of being an Insurance Company as defined above—because it cannot (unless registered as a partnership) be wound up under the Indian Partnership Act, 1932,—but on the ground of it being an unincorporated body of persons carrying on the business of Insurance in British India and whose individual members are domiciled there.

**"Mutual Insurance Companies".**—A Mutual Insurance Company is defined as an "insurer", being a company incorporated under any of the Indian Companies Acts which has no share capital and of which, by its constitution, only, and all, policy-holders are members.<sup>2</sup>

**A "Co-operative Life Insurance Society".**—A Co-operative Life Insurance Society is defined<sup>3</sup> as an "insurer", being a society registered under the Co-operative Societies Act (II of 1912), or under an Act of a Provincial Legislature governing the registration of Co-operative Societies, which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable, and of which by its constitution only original members on whose application the society is registered and all policy-holders are members:

Provided that any Co-operative Life Insurance Society in existence at the commencement of the Insurance Act, 1938, shall be allowed a period of one year to comply with its provisions. These are to be found in sections 96 to 101.<sup>4</sup>

The Act permits other Co-operative Societies to be admitted as members of a Co-operative Life Insurance Society without, however, being eligible for any dividend, profit or bonus.<sup>5</sup>

Power is given to a Provincial Government (subject always to any rules made by the Central Government) to authorise the Registrar of Co-operative Societies of the province to register Co-operative Societies for the insurance of cattle or crops or both under the provisions of any

<sup>1</sup> Sec. 2 (8).

<sup>2</sup> *I.e.*, those of 1866, 1882, or 1913. Sec. 95 (1) (a).

<sup>3</sup> Sec. 95 (1) (b). See, also, sec. 96.

<sup>4</sup> The position in more detail of Co-operative Societies under the Insurance Act, 1938, is the subject of commentary in Chapters X and XI of this treatise, *post.*

<sup>5</sup> Sec. 95 (2).

Co-operative Societies' Act then in force in the particular province concerned.<sup>1</sup>

It may here be noted also that the statute confers on Provincial Governments power to make rules (not inconsistent with any rules made by the Central Government) for the government of such societies : when the provisions of the Insurance Act, 1938, in so far as such provisions may be found inconsistent with such rules, will not apply to such societies.<sup>2</sup>

**A "Provident Society".**—A Provident Society is defined by section 65, which must, however, be read with the succeeding section and the proviso thereto.<sup>3</sup>

**"Life Insurance Business".**—Life Insurance business for the purposes of the Act includes annuity business, that is to say, the business of effecting contracts of insurance for the granting of annuities on human life and, if so provided in the relative contract, disability, double or triple-indemnity accident benefits.<sup>4</sup>

**"Policy-holder".**—The Act provides no complete definition of a "policy-holder". It is content to say that it *includes* a person "who is the absolute assignee of the benefits under the policy".<sup>5</sup> It thus becomes necessary to consider what is meant by this expression where the same has been used elsewhere in relation to the law and practice governing business transactions in the nature of insurance. In England it has been used of anyone having a legal title to the monies payable by virtue of it, *e.g.*, of the executor, trustee or other legal representative, but not of a mere beneficiary or of one who has no more than a lien or a charge upon the policy. A legal, as distinct from an equitable, mortgagee in England may be a policy-holder, but not the owner of the equity of redemption.

By section 29 of the English statute known as the Assurance Companies Act, 1909, a "policy-holder" is defined as "the person who for the time being is the legal holder of the policy for securing the contract with the assurance company". This definition has satisfied no one. It is submitted that the Courts in India would regard as a "policy-holder" anyone claiming to enforce the policy under a legal title to receive the monies secured, *i.e.*, anyone who in a legal as distinct from an equitable sense claims in popular language to stand in the shoes of him in whose favour the policy was originally issued. Manifestly, an absolute assignee comes within the foregoing category.

**"Manager" and "Officer".**—The words "Manager" and "Officer" as used in the Act have the respective meanings assigned to those words in clauses (9) and (11) of section 2 of the Indian Companies Act, 1913.<sup>6</sup> In that Act those words are thus defined :—

"(9) 'manager' means a person who, subject to the control and direction of the directors, has the management of the whole affairs of a company,<sup>7</sup> and includes a director or any other person occupying the

<sup>1</sup> Sec. 95 (3).

<sup>2</sup> See Appendix I, pp. xxxiv and xxxv, *post*.

<sup>3</sup> Sec. 2 (2), also secs. 38, 39.

<sup>4</sup> Sec. 2 (9) and (11) of the Indian Companies Act, 1913.

<sup>5</sup> "The word 'manager'—will not apply to a man who acts once or twice, but he must be a delegate having the control of all the affairs of the company", *per* Quain, J., in *Gibson v. Barton*, [1875] 10 Q.B. 329.

<sup>6</sup> Sec. 95 (4).

<sup>7</sup> Sec. 2 (11).

position of a manager by whatever name called and whether under a contract of service or not :

(11) 'officer' includes any director, managing agent, manager or secretary but, save in sections 235, 236, and 237, does not include an auditor".

**"Managing Agents".**—The expression "managing agent" as defined in the Act <sup>1</sup> "means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement, and includes any person, firm or company occupying such position by whatever name called".

**"Explanation.**—If a person occupying the position of managing agent calls himself manager or managing director, he shall nevertheless be regarded as managing agent for the purposes of section 32 of this Act."<sup>2</sup>

**"Approved Securities".**— "Approved Securities" as defined in the Act <sup>3</sup> mean "Government securities, and any other security charged on the revenues of the Central Government or of a Provincial Government, or guaranteed fully as regards principal and interest by the Secretary of State in Council or the Secretary of State or the Central Government or a Provincial Government ; and any debenture or other security for money issued under the authority of any Act of a Legislature established in British India by or on behalf of a port trust or municipal corporation or city improvement trust in any Presidency-town, or by or on behalf of the trustees of the port of Karachi".

This definition attracts that of "Government Securities" <sup>4</sup> as used therein. By Government Securities, we are to understand what has been so defined in the Indian Securities Act (X of 1920) the relative terms of which are as follows :—

"2. In this Act, unless there is anything repugnant in the subject or context,—

(a) 'Government security' means promissory notes (including treasury bills), stock-certificates, bearer bonds and all other securities issued by the Central Government or by any Provincial Government in respect of any loan contracted either before or after the passing of this Act, but does not include a currency-note".

**"Prescribed".**—The word "prescribed" as used in the Act has reference <sup>5</sup> to what is laid down by statutory rules made under section 114.

**"Certified".**—The word "certified" in relation to any copy or translation of a document required to be furnished by or on behalf of an insurer means "certified by the principal officer of the insurer to be a true copy or a correct translation, as the case may be".<sup>6</sup>

<sup>1</sup> Sec. 2 (13). This reproduces the definition in sec. 2 (1), (9A) of the Companies Act.

<sup>2</sup> As to which, see pp. 514, 515, *post*.

<sup>4</sup> Sec. 2 (7).

<sup>3</sup> Sec. 2 (3).

<sup>5</sup> Sec. 2 (14).

<sup>6</sup> Sec. 2 (5).

So far the words of the section. Presumably, in the case of a partnership, the certificate of anyone of the partners would suffice.

**The "Court".**—The word "Court" as used in the Act means the principal civil court of original jurisdiction in a district, and includes a High Court in the exercise of its ordinary original civil jurisdiction.<sup>1</sup>

### 3. *Certain Statutory Conditions*

We turn now to an enumeration of certain conditions in the nature of "conditions precedent" to any insurer's right to be registered under the Act. And since, as already observed, registration is itself a prerequisite for carrying on the business of insurance within the law of India, the importance of those statutory conditions which have to be fulfilled by every insurer, whether in existence before the commencement of the Act or otherwise, is obvious.

The Act amongst other things aims at affording special protection to holders of life insurance policies, and to that end there are certain provisions as to working capital which must be strictly complied with by every insurer who purposes to carry on insurance business of that character.

Reference will thereafter be made to the system of compulsory deposits which the Act makes obligatory upon every insurer as a prerequisite to registration.

The topic of Registration, as such, will next briefly be discussed, and lastly, the provisions of the Act as to compulsory investment.

The foregoing matters, then, may thus be summarised under their appropriate headings:—

**Working Capital.**—Insurance concerns (other than Mutual Insurance Companies, Co-operative Life Insurance and Provident Societies) which are incorporated, or which commenced carrying on the business of life insurance in British India, whether solely or in common with any other business, after the 26th January, 1937, are to be permitted to carry on such business only if possessed, as working capital, of a net sum of Rs. 50,000 or more, exclusive of any statutory deposit required by the Act and, in the case of a company, exclusive also of any sums payable as preliminary expenses in respect of its formation.<sup>2</sup>

The working capital required in the case of a Mutual Insurance Company, or a Co-operative Life Insurance Society coming into existence after the 26th January, 1937, is Rs. 15,000 exclusive of the statutory deposit and of the preliminary expenses (if any) incurred in the formation of the Company or the Society, as the case may be.<sup>3</sup>

For a Provident Society established after the 1st July, 1939 (i.e., after the commencement of the Act), the requisite minimum sum as working capital is a net amount of not less than Rs. 5,000 exclusive of any statutory deposit and, in the case of a company, exclusive of any expenses incurred in connection with its formation.<sup>4</sup>

No obligations in the matter of working capital are imposed by the statute in the case of any other class of insurance enterprise.

<sup>1</sup> Sec. 2 (6). Is it by a slip in draughtmanship that the "Extraordinary" Original Civil Jurisdiction is omitted?

<sup>2</sup> Sec. 6.

<sup>3</sup> Sec. 97.

<sup>4</sup> Sec. 72.

**Compulsory Deposit.**—The scheme of the Act provides for a system of compulsory deposits affording a measure of permanent security for the ultimate benefit of the policy-holders. The extent of such compulsory deposits is graduated according to the class of insurance business carried on or to be carried on as the case may be. In other words, the deposit varies with the class of insurance business transacted or, in the case of concerns commencing business after a prescribed date, the class of business on which it is intended to embark.

The details of the scheme are set out below.<sup>1</sup> It will suffice for the moment to observe that all compulsory deposits are to be deemed part of the insurer's assets, but must be applied strictly in conformity with the provisions of the statute itself.

**Compulsory Registration.**—The Act compels every "insurer" to register; nor can he lawfully carry on business unless he shall first have obtained from the Superintendent of Insurance a certificate of registration in proper form. The scheme of the Act envisages a period of transition during which insurers already doing business prior to the 1st July, 1939, must make use of the time allowed them by the statute to bring themselves within the law as to registration. As regards prospective insurers, the Act forbids them to commence business without having first obtained the requisite certificate of registration.<sup>2</sup> Registration may be cancelled on proper grounds.<sup>3</sup>

It may be said, therefore, that compulsory registration of insurers represents the key to the whole machinery of Governmental control.

Any person who so commences to transact any class of insurance business or, in the case of a pre-existing insurer, who continues to carry on such business without having first obtained a certificate of registration, commits an offence punishable under section 103 of the Act and thus renders himself liable to a fine which may extend to Rs. 2,000. And any person who knowingly takes out a policy of insurance with any insurer, prior to such insurer having obtained a certificate of registration, renders himself liable under the same section to a fine which may extend to Rs. 500.

The business of re-insurance, however, is exempted from the aforesaid penal sanctions where such re-insurance is effected between the head office of an insurer in British India and the corresponding office of an insurer elsewhere, who has no office in British India.

**Compulsory Investment.**—Stringent provisions have been enacted upon the subject of the investment of assets of insurers so far as such insurers are carrying on or purpose to carry on life insurance business in India. Once registered and established, every such insurer, if incorporated or domiciled in British India, or, if incorporated or domiciled in the United Kingdom, must, at all times, invest and hold invested assets equivalent to not less than 55% of the total amount of such insurer's liabilities to holders of life insurance policies in India,<sup>4</sup> on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India.

Every such insurer may for the purpose aforesaid deduct the amount of any deposit made under sections 7 or 98, i.e., he may count to his

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<sup>1</sup> See p. 520, *post*.

<sup>2</sup> Sec. 3.

<sup>3</sup> Secs. 3 (4), (5), and 70 (4).

<sup>4</sup> Sec. 27 (1) and the explanation thereto.

credit and include in the 55% as an investment, the amount of any compulsory deposit made in respect of life insurance business as defined in the Act. He may also deduct any amount due to him for loans granted by him on policies of life insurance maturing for payment in India and within their surrender values, i.e., the policy itself may be treated by him as an investment for the purposes of this section.<sup>1</sup>

The nature of the investment required by the Act is also laid down, namely, 25% of the amount invested must be in Government Securities as the same are defined in the Act,<sup>2</sup> and a further sum amounting to not less than 30% of the total, if not itself in Government Securities, must be in other approved securities as the same are defined in the Act, or, alternatively, must be in securities of, or guaranteed as to principal and interest by, the Government of the United Kingdom.<sup>3</sup>

The insurer shall comply with the above obligations before the expiry of four years calculated from the 1st July, 1939<sup>4</sup>; provided that of such total amount and before the expiry of one year the insurer shall have invested not less than one-fourth in Government or other approved securities or those of, or guaranteed as to principal and interest by, the Government of the United Kingdom. The balance (i.e., three-fourths) must be so invested within three years calculated from 1st July, 1939.

Obligations analogous to the above, but slightly differing in detail, are imposed upon insurers incorporated in British India, one-third of whose share capital is owned by individuals domiciled elsewhere than in British India or in the United Kingdom, or whose governing body to the extent of one-third consists of individuals so domiciled.<sup>5</sup>

Such corporations are placed upon the same footing for the purposes of compulsory investment as insurers incorporated or domiciled elsewhere than in British India or the United Kingdom, who are required<sup>6</sup> at all times to invest and hold invested assets equivalent to not less than the total of their liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India.<sup>7</sup>

The deductions mentioned in the case of insurers incorporated or domiciled in British India or the United Kingdom are, in respect of such compulsory investment of assets, allowable also to insurers incorporated or domiciled elsewhere.

The extent and character of the investment required in the case of such foreign insurers is, however, 33½% in Government securities as defined in the Act and the balance in securities identical with those laid down to an extent of not less than 30% in the case of indigenous undertakings, or of those incorporated or domiciled in the United Kingdom, as set forth above.<sup>8</sup>

The period allowed for compliance with the above-mentioned provisions of the Act is 4 years calculated from the 1st July, 1939.<sup>9</sup>

It remains to note a further provision applicable to all non-Indian insurers upon whom these obligations in the matter of investment of assets fall, i.e., all non-Indian insurers engaged in the business of life insurance in British India. All assets so invested must be held in trust for the discharge of the claims above-mentioned. Such assets, moreover,

<sup>1</sup> Sec. 27 (1).

<sup>2</sup> See p. 507, *ante*.

<sup>3</sup> See the explanation to sec. 27 (4).

<sup>4</sup> Here by "India" the Legislature means, it is thought, "British India".

<sup>5</sup> Sec. 27 (2).

<sup>6</sup> Sec. 27 (1).

<sup>7</sup> Sec. 27 (3).

<sup>8</sup> By sec. 27 (3).

<sup>9</sup> Sec. 27 (3).

as are thus invested, pursuant to the foregoing provisions of the Act, must be vested in trustees who are (a) resident in British India, and (b) approved by the Central Government. Such vesting is to be accomplished by a sufficient instrument of trust, executed by the insurer and approved by the Central Government, which instrument shall, *inter alia*, define the manner in which alone the subject-matter of the trust is to be dealt with, i.e., the instrument must create such a trust as, in terms, complies with the provisions of section 27 of the Act as to the claims which are to be secured by the sums so invested.<sup>1</sup>

The effect of the foregoing provisions as to compulsory investment is to insure that 100% of the liabilities in the matter of life insurance claims for which non-Indian companies may be answerable, are secured by appropriate investment. In the case of Indian companies carrying on such business, 55% of such claims are similarly secured.

To provide against the concealment of assets, e.g., by means of *benami* investment, all assets, other than those existing in the form of statutory deposits or of assets vested in trustees in accordance with the scheme of compulsory investment mentioned above, must be kept in the name of the registered insurer, i.e., if a company, then in the corporate name of the undertaking, or, if a firm, in the name of the partners, or, if an individual, in the name of the proprietor.<sup>2</sup>

**Employment of Licensed Insurance Agents.**—The scheme of Governmental control which it is the main purpose of the Insurance Act, 1938, to establish, extends to those ordinary agents of an insurer who constitute the usual channels by which business is introduced. Such an agent is defined by the Act as “an individual who receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business”.<sup>3</sup>

The statute makes it obligatory on persons desirous of acting as insurance agents to obtain a licence from the Superintendent of Insurance or from some officer duly authorised by the said Superintendent in that behalf. Any unlicensed person acting as an insurance agent after the 1st January, 1940, or any insurer employing any such unlicensed person or transacting any insurance business in British India through him after the said date, will, in so doing, be committing an offence punishable with a fine which may extend to Rs. 50 and Rs. 100, respectively.<sup>4</sup>

Earlier in the Act, namely, in section 40 (1), an insurer already employing an unlicensed insurance agent is given six months calculated from 1st July, 1939, to employ licensed insurance agents only. Failure to rectify the position before the 1st January, 1940, would apparently bring the insurer within the mischief of section 43 (2) which came into force on 1st January, 1940, and, as certainly, within that of section 102 (1).

**Conditions touching a Licence.**—No person can properly obtain a licence under the Act to engage himself as an insurance agent who suffers from any of those disqualifications which are set out in clauses (a) to (d) of section 42 (4) of the statute.

The disqualifications there enumerated may be thus summarised :—minority; a finding by a Court of competent jurisdiction that the person is of unsound mind; conviction by a Court of competent jurisdiction of an

<sup>1</sup> Sec. 27 (4).

<sup>2</sup> Sec. 2 (10). See, also, pp. 517, 518, *post*.

<sup>3</sup> Sec. 31.

<sup>4</sup> Sec. 43 (2) and (3).

offence amounting to cheating, criminal<sup>1</sup> breach of trust or criminal misappropriation; a finding in the course of any judicial proceeding relating to an insurance policy, or to the winding up of an insurance company, or in the course of an investigation into the affairs of an insurer, that the applicant for the licence has been guilty of or has knowingly participated in or connived at any fraud, dishonesty or misrepresentation against an insurer or an assured.<sup>1</sup>

**Obtaining and renewing Licences.**—To obtain an agent's licence the applicant must comply with the provisions of section 42 and Rule 16, i.e., he must pay into the Reserve Bank of India or the Imperial Bank or into any Government Treasury the fee of Re.1 and forward the receipt for the same with his application (which must be in Form V) to the Superintendent of Insurance.<sup>2</sup>

Such a licence will automatically expire, unless renewed, on the 31st March next ensuing upon the date of issue. Should the licensee, in the meantime, not have brought himself within any of the clauses of section 42 (4) as to disqualification, the licensing authority must renew the licence under the same conditions; and so on from year to year on payment by the licensee each year of a renewal fee of Re.1.<sup>3</sup>

**Cancellation.**—The discovery that an insurance agent suffers from any of the foregoing disqualifications makes it obligatory on the Superintendent of Insurance to cancel the licence. If, moreover, such an agent has knowingly contravened any provisions of the Act, he exposes himself to like treatment, but at the discretion only of the Superintendent of Insurance. The power so to cancel an Insurance Agent's licence is without prejudice to any other penalty to which the agent by his conduct may have exposed himself under the statute.<sup>4</sup> In every such case the Superintendent must reclaim the actual licence, inform all other licensees, and gazette the cancellation in accordance with Rule 17.

**Register of Agents.**—The provisions of section 43 (1) of the Act impose upon every insurer, as also upon every person who on behalf of an insurer employs licensed agents, to maintain a Register of them, wherein must be set out, besides the name and address of every such agent, the date of such agent's appointment and, in due course, the date on which such appointment came to an end.

**Appeals.**—An appeal lies to the appropriate civil court against an order made under section 42 of the Act, cancelling a licence once issued to an agent.<sup>5</sup> The appropriate Court for the purpose of any such appeal is the principal Court of civil jurisdiction within whose local limits the principal place of business of the insurer concerned is situate.<sup>6</sup>

A further appeal shall lie from the decision of the aforementioned Court, and the decision of the said next appellate authority will be final.<sup>7</sup>

A few observations upon the foregoing provisions touching appeals may be useful. In the first place, it is to be noticed that the statute itself gives no right of appeal against an order of the Superintendent of Insurance refusing to issue a licence at the first instance or against an order of the same authority declining to renew it.

<sup>1</sup> Sec. 43 (2) and (3).

<sup>2</sup> Sec. 42 (3).

<sup>3</sup> Sec. 110 (1) (e).

<sup>4</sup> For this Form, see Appendix II, p. ciii, *post*.

<sup>5</sup> Sec. 42 (5).

<sup>6</sup> Sec. 110 (2).

<sup>7</sup> Sec. 110 (3).

In a case where a Superintendent, or an officer authorised by him in that behalf had perversely, or otherwise wrongfully, refused a licence, a person who under the statute had applied for it, and was not suffering from any statutory disqualification, will thus have no specific and adequate legal remedy under the Act. It is submitted, however, that an individual, if so aggrieved by an order of refusal made by a Superintendent of Insurance within a Presidency-town, would have a right to an order in the nature of a *mandamus* under section 45 of the Specific Relief Act (I of 1877), which order is in lieu of the prerogative writ of *mandamus* which is abolished by that statute. Such an order on the part of a High Court under section 45 of that Act would, in form, command the Superintendent of Insurance to perform his statutory duty by granting or renewing the licence, as the case might be.

Unhappily, the writ of *mandamus* in India originally issued only out of the old Supreme Courts,<sup>1</sup> and the right to issue the writ was inherited only by the High Courts of the three Presidency-towns which succeeded them. Unhappily, too, the new remedy under section 45 of the Specific Relief Act is also available only in those Presidency-towns: on the principle, no doubt, that the citizens of those towns only had enjoyed the remedy for which section 45 was intended to provide a substitute.

It is the opinion of many that the extension of these powers to the other High Courts in India, so as everywhere to provide the citizen with the means of compelling the performance of statutory duties, is a measure of reform already long overdue.

The student, moreover, may be reminded of a fallacious notion, not infrequently entertained by members of the general public, namely, that the granting or not granting of licences, whether in the first instance or by way of renewal, by authorities which are the creatures of statute, is a matter entirely in the discretion of such authorities, in the sense that the authority can act in the matter entirely at its good pleasure. This is a vulgar error. For, even such an expression as "may, if he thinks fit," in a statute or in a statutory rule does not so operate as to confer upon the individual exercising the authority a liberty to act "as he chooses."<sup>2</sup> The true doctrine governing the exercise of discretion by any statutory authority is equitable both in its origin and in its application. "When it is said that something is to be done within the discretion of the authority, that something has to be done according to the rules of reason and justice, not according to private opinion; according to law, not humour; it is to be not arbitrary, vague and fanciful, but legal and regular." (Per Lord Halsbury in *Sharpe v. Wakefield*, [1891] A.C. 173, 179.)

**Directorate of Life Insurance Companies.**—The Board of Directors of every insurer carrying on the business of life insurance and being a company incorporated in British India, must be so constituted or re-constituted, as the case may be, as that not less than one-fourth of the directors shall be persons who, besides having the prescribed qualifications, shall themselves be holders of policies of life insurance issued by the company. Such policy-holders are to be elected to the Board in the prescribed manner by the holders of life policies issued by the company. But this provision so far as existing companies be concerned

<sup>1</sup> Of Calcutta, Bombay and Madras.

<sup>2</sup> See the observations of Lord Wrenbury in *Roberts v. Hopwood*, [1925] A.C. 571, 613.

does not take effect till 1st July, 1940: in the case of other companies not before the expiry of two years calculated from the date of registration as a life insurer.<sup>1</sup>

#### 4. *Certain Statutory Prohibitions*

We may now call attention to a number of statutory prohibitions which should be noticed as pre-eminently affecting businesses not established prior to the commencement of the Act, though some of them extend also, or have special reference to, existing undertakings.

**Business on the "dividing principle".**—In the forefront of such prohibitions may be placed that which forbids, as and from the 1st July, 1939, any insurer to start doing business upon the "dividing principle", which the Act defines as "the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits"<sup>2</sup> or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits.

It is provided, however, that an insurer is not to be prevented from allocating bonuses to holders of policies of life insurance as a result of a periodical actuarial valuation either as reversionary additions to the sums insured or as immediate cash bonuses, or otherwise.<sup>3</sup>

A similar prohibition extends to Provident Societies.<sup>4</sup>

The above prohibition is, however, qualified to meet the case of such pre-existing insurance undertakings as may already have established business relations on the dividing principle. Insurance undertakings so situated are given a period of three years, calculated from the 1st July, 1939, within which to discontinue such business. Notwithstanding the foregoing general prohibition they may be allowed to carry on insurance business on the "dividing principle" so long as they withhold from distribution a sum not less than 40% of the premiums received during each year (calculated from the 1st July, 1939) in which such business is continued, so as to make up the amount required for compulsory investment as heretofore mentioned.<sup>5</sup>

**Statutory prohibition to employ Managing Agents.**—Section 32 (1) of the Act provides as follows:—

"32. (1) No insurer shall, after the commencement of this Act, appoint a managing agent for the conduct of his business."

This prohibition also applies to Provident Societies.<sup>6</sup>

To meet the case of pre-existing insurers the conduct of whose business is already in the hands of managing agents under contracts which in many cases would not run out in the ordinary course before the expiry of several years; and in order to mitigate in every such case the hardships incidental to the severance of long-established business connections of this character, the Act provides for a period within which insurers so situated must comply with the statutory prohibitions so enacted.<sup>7</sup> That period is three years calculated from the 1st of July, 1939.

<sup>1</sup> Sec. 48 (1) and (2).

<sup>4</sup> Sec. 69 (1).

<sup>2</sup> Sec. 52.

<sup>3</sup> Sec. 52.

<sup>6</sup> Sec. 71.

<sup>5</sup> *Ibid.*

<sup>7</sup> Sec. 32 (3).

In protection of any Insurer who may find himself compelled by the statute to determine a managing agency contract before its due term has run out, it is enacted by section 32 (2) that no compensation shall be payable to any such managing agent by reason only of the premature termination of his employment as such.

There is one other provision of the statute, touching such managing agents who, under the conditions above-named, may be permitted to continue in their employment, which must here be noted. As from the 1st July, 1939, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in any agreement entered into by an insurer or in the Articles of Association of an insurer, being a company, the remuneration of a managing agent may not be above Rs.2,000 per mensem. Included in the concept of "remuneration", for the purpose of the relative enactment, are salary and commission as well as any other form of remuneration payable to and receivable by a managing agent for his services as such.<sup>1</sup>

To meet cases of attempted evasion of this prohibition, it is provided that if a person, in fact occupying the position of a managing agent, calls himself manager, or managing director, he shall nevertheless be regarded as a managing agent for the purposes of section 32 of the Act, and will thus bring himself and his company within the mischief of that penal section of the Act which renders such a managing agent liable on conviction to a fine which may extend to Rs.1,000, and in the case of any continuing contravention of the prohibition to an additional fine which may extend to Rs.500 for every day during which the default continues.<sup>2</sup>

**Minimum limits for annuities and other benefits.**—While Mutual Insurance Companies, Co-operative Life Insurance Societies and Provident Life Insurance Societies, as recognised by the Act, may continue to pay or undertake to pay on any policy of insurance an annuity of Rs.50 or less or a gross sum of Rs.500 or less exclusive of any profit or bonus, no other insurer, within the meaning of the statute, may continue so to do after the 1st July, 1939: provided always that such an insurer may convert such a policy into a paid-up policy of any value, or make payment of a surrender value to any amount.<sup>3</sup>

It is to be observed, however, that the prohibition does not apply to group policies: that is to say, policies in respect of a group of persons engaged in the same occupation or a kindred occupation under the same employer for an aggregate sum of not less than Rs.5,000, under which any insurer pays or undertakes to pay a gross sum of Rs.500 or less on an individual life.<sup>4</sup>

**Prohibition of loans and advances.**—The Act contains stringent provisions having for their object the checking of possible abuses in the matter of loans or temporary advances to directors or other officials of companies or to individual partners of firms.

Notwithstanding any contract to the contrary, the Act imposes an obligation on any existing borrower, being a director, manager, managing agent, auditor, actuary, officer or partner in any insurance undertaking in respect of any loan already granted to him, to repay the same within one year calculated from the 1st July, 1939; and in case of default the defaulter shall cease to hold office as and from the 1st July, 1940.

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<sup>1</sup> Sec. 32 (3).

<sup>2</sup> Sec. 4 (1).

<sup>3</sup> Sec. 102 (1).

<sup>4</sup> Sec. 4 (2).

As and from the 1st July, 1939, the granting of loans or temporary advances by any insurer, either on hypothecation of property or on personal security or otherwise except loans on life-policies issued by such insurer within their surrender value, to any director, manager, managing agent, actuary, auditor or officer of the insurer, if a company, or, where the insurer is a firm, to any partner therein, or to any other company or firm in which any such director, manager, managing agent, actuary, auditor, officer or partner holds the position of a director, manager, managing agent, actuary, auditor, officer or partner, as the case may be, is *absolutely prohibited*.<sup>1</sup>

The Act expressly permits insurers to lend to a banking company; and loans to and from subsidiary companies are expressly protected.<sup>2</sup>

**Restriction on dividends and bonuses.**—No individual insurer or unincorporated body, or body corporate incorporated under the law of any country other than British India, carrying on life insurance business having his or its principal place of business in British India, or being domiciled there, may, in respect of such life insurance business, declare or pay any dividend to shareholders or any bonus to policyholders, except out of a surplus ascertained as a result of an actuarial valuation of the assets and liabilities of such insurer.<sup>3</sup>

A similar prohibition is imposed upon corporations incorporated under any law for the time being in force in British India, where such a corporation is carrying on life insurance business in British India. The prohibition extends also to any incorporated body which stands to the former corporation in the relation of a "subsidiary company" as the same is defined in section 2 (2) of the Indian Companies Act, 1913.

The prohibition has no application to any insurer who falls within the category of a local agent of Lloyd's underwriters as recognised by the statute.<sup>4</sup>

**Prohibition of Rebates.**—Rebates allowable in accordance with the published prospectuses or tables of the insurer are not subject to prohibition.<sup>5</sup> All other rebates offered as inducements to a person to effect or renew an insurance in respect of any kind of risk relating to lives or property in India is expressly forbidden by section 41 (1) of the Act.

**Prohibition of cessation of payment of commission.**—Where a licensed agent shall have served a person in connection with the business of insurance continuously and exclusively for at least 10 years, and does not, after ceasing to act as agent, directly or indirectly solicit or procure insurance business for any other person, the person having in the past employed the said licensed agent, is forbidden, *notwithstanding anything to the contrary in any contract between the parties*, to treat as forfeited, or to stop payment of, any renewal commission; nor, in respect of life insurance business done in India, may he refuse payment to such an insurance agent of commissions due to him under any agreement by reason only of the termination of the said agreement except for fraud.<sup>6</sup>

<sup>1</sup> Sec. 29.

<sup>2</sup> *Ibid.*

<sup>3</sup> Sec. 49. But see sec. 112.

<sup>4</sup> Sec. 49.

<sup>5</sup> Prospectuses and tables must conform to the provisions of Rule 11 (*vide* p. xcii, *post*).

<sup>6</sup> Sec. 44.

**Remuneration generally.**—Section 40 (1) contemplates two classes of persons as entitled to reward, whether by commission or otherwise, for “soliciting or procuring” insurance business in India. In respect of this particular labour the sub-section prescribes the limit of such reward. The persons affected by the provisions of the section are (i) a mere insurance agent and (ii) one who, whether or not he be himself an insurance agent within the meaning of section 2 (10), is one who is acting on behalf of an insurer and who employs subordinate insurance agents of his own choice. The distinction would appear to recognise, as indeed it ought, the existence of particular “persons” in the widest sense of that word—for they are often partnership firms or joint-stock companies—to whom, by a process of decentralization or delegation, an insurer confides much of the business of insurance which has to be transacted over and above that of mere solicitation or procurement of contracts. What the insurer is himself doing is selling his “cover”. To pursue the metaphor of sale, he has more to do than merely advertise and offer his wares; for he has to fulfil the contracts into which he enters. The practice is for insurers often to employ persons whom they style “Chief or Principal Agents”. In some sense the latter act as middlemen, but they also act as organisers and large-scale collectors of payments under existing contracts.

So far then as their services consist in the “soliciting and procurement” of insurance business, their remuneration is fixed by section 40 (2) of the statute; and it is evident that, *qua* those services, they must take out the licence prescribed by the statute for an insurance agent. But the services which, in practice, a chief or principal agent performs extend far beyond mere solicitation or procurement of business. Much of his labour is anterior to such procurement; much again is posterior to it. Like his principal, he has a great deal to do in regard to the performance of contracts already procured. For all such additional services he is entitled to reward; and the statute is only concerned with him in respect of such duties as are within the ambit of the words “soliciting or procuring insurance business”. In respect of all other services the insurer and his delegates are free to make the best bargain they can.

The scheme of the Act, as indicated by the wording of the section under review, is to prohibit more than 55% of the first year's premium in the case of every life insurance policy, or more than 15% in the case of any other class of policy, being spent upon the remuneration of those who have actually procured the contract. Indeed remuneration to the extent of 55% is permissible only where life-insurers are building up their business during the first ten years of its existence. Afterwards the statutory limit falls to 40%.<sup>1</sup>

By sub-section (3) gratuities or renewal commissions on business effected prior to the 27th of January, 1937, are left unaffected by the provisions of section 40. Thus a person who has brought in such business before the last-named date may be paid a gratuity or a renewal commission in terms of any contract between him and the insurer which was still subsisting on the last-named date. Persons not so positioned can only receive remuneration to the extent provided in sub-section (2).

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<sup>1</sup> It is quite immaterial when or in what manner the remuneration is payable or paid. The limit is so much of the first year's premium, not of the money received by way of premium in any one calendar year or period of 12 calendar months.

Under the general law the cancellation of an agent's contract usually disentitles him to any further commission in respect of business already brought in, unless the contract itself otherwise provides. Insurers, however, may gratuitously reward a person whose contract has been cancelled for one reason or another, without being within the mischief of any statutory prohibition under the Insurance Act, 1938, so long as what is paid gratuitously, or otherwise, be in respect of insurance business effected prior to the 27th of January, 1937, and that, prior to the last-named date, the relationship of principal and agent had subsisted between the parties.

As an introduction to the submissions made below it may be as well to record the fact, however obvious, that the same person cannot be at once the principal and the agent. But though an insurer cannot be his own agent, the question may be asked whether any, and, if so, which, of an insurer's salaried servants come within the definition; for every such servant, if included, would have to take out a licence under section 42; and the provisions of section 40 (1)—it might be argued—would apply to the relative salaries. There arises, moreover, the further question, namely, what is the legal result under the Act of such a servant drawing commission in respect of a policy upon his own life or property. That such a commission is generally allowed is a matter of common knowledge.

To be within the definition of an insurance agent the person must agree to or receive *payment*—no matter in what form—in *consideration* of “soliciting or procuring” business. The words italicised by the writer clearly indicate, it is submitted, the answer to the first question posed. The statute does not read “wholly or partly in consideration”; nor are there words, apt or otherwise, whereby the definition in terms may include an office manager or assistant. The salary drawn by an insurance company's staff—from that of the manager to that of the humblest menial—is not paid in *consideration* of soliciting or procuring business, albeit the duties of some of that staff doubtless include the development and supervision of a sound scheme of publicity and the making of contracts with chief or other agents. The remuneration paid to managers and assistants is thus seen to be in consideration of the performance of duties of a wide and general nature, and cannot be disintegrated so as to dissect out work done prior to any contract and work done in pursuance of the same. Nor is there anything in the statute to render such disintegration necessary. Where, however, a servant of an insurer is paid a commission upon a policy on the ground that he himself has, in fact, procured the business, such an one evidently brings himself, *qua* that particular transaction, within the definition of an insurance agent.<sup>1</sup> He, as patently, by merely bringing in the business *without* taking a commission for so doing, continues outside that definition.

There remains the question of a commission on a servant's own life or property policy. Here, it is submitted, that what is done amounts in effect to a rebate on the premium; and that it will be permissible under section 41 (1) if in accord with the insurer's published prospectuses or tables, and not otherwise. An insurance agent in respect of a policy upon his own life or property if issued by his principals is, it is submitted, no differently placed.

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<sup>1</sup> It follows that the amounts paid in the form of commission to an insurer's own servants would have to be taken into consideration when so ordering the expenditure on procurement of business as to comply with sec. 40 (2).

### 5. *Reciprocity*

The policy of the Law of India as evidenced in the Insurance Act, 1938, is to afford foreign insurance enterprise in British India the same facilities (or facilities as nearly corresponding as may be) and the same degree of protection which other countries offer, or may be prevailed upon to offer, to Indian nationals carrying on or seeking to carry on insurance business abroad. The principle thus not only advocated but exemplified in the provisions of the Act may, perhaps, be conveniently termed "the principle of reciprocal treatment" or, simply, "the principle of reciprocity".

**Statutory Aids to Enforcement.**—The statute, indeed, imposes upon the Central Government, if satisfied of the existence of any disabilities under which Indian nationals are placed by the law or practice of any foreign country in relation to this matter, the duty of directing by an appropriate notification in the official Gazette that the same, or requirements as similar thereto as may be, shall be imposed upon the insurers of that country as a condition of carrying on the business of insurance in British India.<sup>1</sup>

Every foreign insurer who, having his principal place of business or domicile outside British India, establishes a place of business in British India or appoints a representative in British India with the object of obtaining insurance business, must, within three months from the establishment of such place of business or from the appointment of such a representative, file with the Superintendent of Insurance—

- (a) a certified copy of the charter, statutes, deed of settlement or memorandum and articles or other instrument constituting, or defining the constitution of, the insurer, and, if the instrument is not written in the English language, a certified translation thereof;
- (b) a list of the directors, if the insurer is a company;
- (c) the name and address of some one or more persons resident in British India authorised to accept on behalf of the insurer service of process and any notice required to be served on the insurer, together with a copy of the power of attorney granted to him;
- (d) the full address of the principal office of the insurer in British India;
- (e) a statement of the classes of insurance business to be carried on by the insurer; and
- (f) a statement, verified by an affidavit, setting forth the special requirements, if any, of the nature specified in section 62 imposed in the country of origin of the insurer on Indian nationals;

and, in the event of any alteration being made in the address of the principal office or in the classes of business to be carried on, or in any instrument here referred to, or in the name of any of the persons here referred to, or in the matters specified in clause (f) above, the company shall forthwith furnish to the Superintendent of Insurance particulars of such alteration.<sup>2</sup>

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<sup>1</sup> Sec. 62.

<sup>2</sup> Sec. 63.

## 6. Deposits : Graduated Scale

By every insurer, other than a local agent of Lloyd's, the following sums of money in cash, or approved securities of an equal value, must be deposited and kept in deposit with the Reserve Bank of India in one of its offices in India in respect of the relative class of business named<sup>1</sup> :—

(i) Life Insurance only .. .. .	Rs. 2,00,000
(ii) Fire Insurance only .. .. .	„ 1,50,000
(iii) Marine Insurance only .. .. .	„ 1,50,000
(iv) Marine Insurance relating only to country craft or its cargo .. .. .	„ 10,000
(v) Accident and Miscellaneous Insurance in British India (including Workmen's Compensation and Motor Car Insurance) .. .. .	„ 1,50,000

It would seem that an insurer who is doing all or any of the types of insurance comprehended under (v) above will make the same deposit, i.e., no more than Rs.1,50,000.

(vi) Life Insurance and any two of the three classes under items (ii), (iii) and (iv) above	Rs. 3,00,000
	(of which Rs. 2,00,000 shall be the deposit for life insurance business).
(vii) Life Insurance combined with any two of the classes of business known as (i) Fire, (ii) Marine, (iii) Accident, or any class of insurance included in the term Miscellaneous Insurance as defined in (v) above .. .. .	„ 4,00,000
(viii) Life Insurance combined with any three of the foregoing classes of Insurance .. .. .	„ 4,50,000
(ix) Any two of the foregoing classes of Insurance business other than Life Insurance .. .. .	„ 2,50,000
(x) All classes of Insurance business other than Life Insurance .. .. .	„ 3,50,000
(xi) Provident Societies .. .. .	„ 5,000

But such societies must thereafter annually deposit a further sum amounting to not less than  $\frac{1}{5}$  of the gross premium income for the year (including all admission fees) until the total deposited shall reach 50,000 at which figure it is to be maintained.<sup>2</sup>

(xii) Mutual Insurance Companies and Co-operative Life Insurance Societies in respect only of life insurance business carried on in British India .. .. .	Rs. 2,00,000
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**Market Value of Securities.**—The market value on the day of the deposit of securities lodged in pursuance of any of the provisions of the Act with the Reserve Bank of India is to be determined by that Bank. The Bank's decision is final.<sup>3</sup>

**Substitution of Securities.**—An insurer (including a Provident Society) may at any time substitute for securities lodged with the Reserve

<sup>1</sup> Sec. 7 (1).<sup>2</sup> Sec. 73 (1).<sup>3</sup> Sec. 120.

Bank under section 7 other approved securities of equal value at the market rate prevailing on the date of substitution.<sup>1</sup>

**Investment.**—If requested by such a depositor so to do, the Reserve Bank of India shall invest in "approved securities" the whole or any part of a deposit made originally in cash, or the whole or any part of cash received by the Bank on sale of or on the maturing of securities lodged by the depositor.<sup>2</sup>

**Transfer of Previously Deposited Securities.**—Any securities already deposited with the Controller of Currency in compliance with the Indian Life Assurance Companies Act, 1912,—which, the reader will remember, has been repealed by the Insurance Act, 1938—shall by the said Controller, be transferred to the Reserve Bank of India and shall, to the extent of their market value on the day of such transfer, which it would seem will be treated as the day of compliance with section 7 of the Insurance Act, 1938, be deemed to be deposited under the Insurance Act, 1938, in respect of the Insurer's Life Insurance business.<sup>3</sup>

**Deposit for one class a condition precedent to commencing business in another.**—Where an insurer is liable to make a deposit under sub-section (1) of section 7, or is a local agent of a Lloyd's underwriter, liable under sub-section (2) of the same section to make a deposit, and has not yet fully complied with the relative conditions as to making such deposit, he may not undertake any other class of insurance business in addition to the class or classes for which he is still liable to complete the requisite amount, until such requisite amount shall have been deposited in full.<sup>4</sup>

**Persons affected by the Act.**—Foreign insurers (not excluding British concerns) who were carrying on business in British India before the 1st of July, 1939, or before that date had been maintaining a place of business in this country or had been employing a representative here, but who had entered into no further contracts of insurance since the said date, remain outside the provisions of the Act. In other words, they are permitted slowly to wind up the class of business in British India which they had been doing prior to the commencement of the Act, without being subjected to the administrative control which the Act creates.<sup>5</sup> Local representatives of Lloyd's are not so protected.

All other insurers as defined in the Act, so long as there be unsatisfied liabilities in British India in respect of the particular class of insurance business undertaken, or so long as such liabilities, if unsatisfied, be not otherwise provided for, come under the Act for all purposes.<sup>6</sup>

**Statutory Deposits how made.**—With few exceptions insurers are permitted to make their statutory deposits by instalments. The number and extent of such instalments vary with the character of the insurance concerned as well as with its provenance. All the requisite provisions are to be found in section 7, sub-sections (2) to (4).<sup>7</sup> The exceptions are foreign undertakings which have been carrying on business in British India since the 27th of January, 1937, which, if

<sup>1</sup> Sec. 7 (9).

<sup>2</sup> Sec. 7 (7).

<sup>3</sup> Sec. 2B. The words are "any new contract" as to which see p. 529, *post*.

<sup>4</sup> Sec. 2A.

<sup>5</sup> Sec. 7 (9).

<sup>6</sup> Sec. 7 (6).

<sup>7</sup> See Appendix I, pp. x and xi, *post*.

Corporations, have not been incorporated in British India or have not their principal place of business here. Every such insurer is required to make the statutory deposit in full before he can obtain registration under the Act.

At the time of writing, the Act has been in force for some months and all insurance undertakings minded to register under it have long been acquainted with their statutory duties in respect of the requisite deposits, and with the Statutory Rules in aid of their performance. Accordingly it will suffice for the purposes of this treatise to call the student's attention to the sections named above and to the relative rules which are Nos. 5 to 10 (inclusive).<sup>1</sup>

**Nature and Operation of Deposit Account.**—In order to make the Central Government answerable to the depositor in respect of the cash or securities lodged with the Reserve Bank of India under the provisions of section 7 (1) or any other section relating to the same matter, the insurer is deemed to be lodging such cash or securities, as the case may be, with the Central Government; and the Reserve Bank of India is treated as the agent of the Government for the acceptance of the Deposit.<sup>2</sup>

A deposit so made in cash is to be held by the Reserve Bank of India to the credit of the insurer; and any interest accruing due on such securities and collected by the Bank is to be paid to the insurer, i.e., credited to the insurer in an account, subject only to deduction of the normal commission chargeable for such collection.<sup>3</sup>

Any deposit made under section 7 or section 98 shall be deemed to be part of the assets of the insurer, but cannot be assigned or charged; nor can it be made available for the discharge of any liability of the insurer other than liabilities arising out of policies of insurance issued by the insurer, so long as any such liability remain undischarged. A deposit is not liable to attachment in execution of any decree, except one obtained by a policy-holder of the insurer in respect of a debt due upon a policy, and which the policy-holder has failed to realise in any other way.<sup>4</sup>

A deposit made in respect of life insurance business cannot be made available for the discharge of any liability of the insurer other than liabilities arising out of policies of life insurance issued by the insurer.<sup>5</sup>

Where a deposit made under section 7 of the Act is used by the insurer in discharge of any of his liabilities, the insurer shall similarly deposit such additional sum in cash or approved securities as will make up the amount so used.<sup>6</sup>

This provision implements the duty imposed by section 7 (1) not only to deposit but "to keep deposited" the requisite amount relative to the particular class of insurance business undertaken. The Insurer is deemed to have failed to comply with the above provision as to maintenance of the deposit at the proper level, unless the deficiency brought about by his use of it in discharge of particular liabilities is supplied within a period of two months from the date when the deposit or any part of it was so used.<sup>7</sup>

<sup>1</sup> See Appendix II, pp. xc-xcii, *post*.

<sup>2</sup> Sec. 7 (1).

<sup>3</sup> Sec. 7 (8) which applies also to Provident Societies.

<sup>4</sup> Sec. 8 (1) which applies also to Provident Societies.

<sup>5</sup> Sec. 8 (2).

<sup>6</sup> Sec. 7 (10).

<sup>7</sup> Sec. 7 (10) which applies also to Provident Societies.

**Refund of Deposit.**—Where an insurer has ceased to carry on in British India any class of insurance business in respect of which a deposit has been made under section 7 or section 98, and his liabilities in British India in respect of such business have been satisfied or otherwise provided for, the insurer may apply to the Court for an order on the Central Government and the Reserve Bank of India as its agent, directing the return to the insurer of so much of the deposit as does not relate to the classes of insurance, if any, which the insurer continues to carry on.<sup>1</sup>

From the foregoing provisions it is plain that the Reserve Bank of India must maintain for each insurer a separate account upon which, in some sense, the insurer must be entitled to operate. It is evident, however, that as the deposit is made to the Central Government and not to the Bank, there is not, between the depositor and the Reserve Bank any relation of Banker and Customer. It is submitted, however, that were the Bank to prevent the insurer from applying the deposit or any part of it in a manner and for a purpose permitted by the statute, the Central Government and alternatively the Bank, might be made liable for any damage which the insurer should sustain in consequence.

While the statute itself is silent as to the manner in which the insurer may make demand on the Reserve Bank in respect of such user of the deposit as is permitted him, the Central Government has taken powers to prescribe, by means of statutory rules, the procedure to be followed by the Reserve Bank in dealing with deposits made by insurers in pursuance of the Act.<sup>2</sup>

## 7. *The Trade Name*

**Principles of law.**—Within certain limitations, it is permissible under the law of India for an individual, or for two or more individuals bound together under the terms of an agreement to carry on business in partnership or in some corporate capacity, to assume for the purpose of so carrying on business a Trade name or style of their own choosing. He or they, as the case may be, may include in the trade name so chosen such expressions as "and Sons", "and Bros.", "and Company" as the case may be, or, simply, "Company", although the inclusion of such words would ordinarily suggest to the beholder in the one case a family partnership and in the other a corporate body.

The use of such expressions as "Crown", "Imperial", "Federal", "Royal", etc. (which are forbidden to corporations other than those which can bring themselves under section 11 (3) of the Companies Act), is not forbidden to firms or other types of proprietary concern. For the statutory prohibitions as to the improper use of the words "Provident" or "Limited" in connection with any trade name, the reader is referred to what is set forth below.

**Equitable Jurisdiction to protect names.**—The Court, in its equitable jurisdiction restrains, in a proper case, the use of a name, though not forbidden by any statutory enactment, where its use might lead the public to confuse the concern with some other pre-existing concern whether registered or not. (*Oriental Government Security Life Assurance, Ltd. v. Oriental Assurance, Ltd.*, [1913] 40 Cal. 570.)

<sup>1</sup> Sec. 9.

<sup>2</sup> By sec. 114 (2), cl. (c). See Rules 5 to 10 (inclusive) of the Insurance Rules, 1939, Appendix II, pp. xc, xci, and xcii, *post*.

Lastly, where an individual has entered into a contract not to use a particular name, or a name so similar to one mentioned in the contract as that its use might be calculated to deceive the public to the detriment of the other contracting party or parties, the assumption of a name in breach of such a contract, or even the threat to assume such a name may, in a proper case, be restrained by the Court at the instance of the other contracting party or parties. Such danger, however, in practice, more often attends the assumption of trade names by individuals than by partnership firms or by corporations.

**Statutory Prohibitions.**—The Superintendent is forbidden to register an insurer by a name identical with that by which an insurer in existence is already registered, or so nearly resembling that name as to be calculated to deceive, unless the insurer in existence (a) is in the course of being dissolved, and (b) signifies to the Superintendent his consent.

The foregoing prohibition is contained in section 5 (1) of the Act.

**Change of Name.**—Sub-section (2) of the foregoing section is in the following terms :—

“(2) If an insurer, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which an insurer already in existence, whether previously registered or not, is carrying on business, or so nearly resembling it as to be calculated to deceive, the first-mentioned insurer shall, if called upon to do so by the Superintendent of Insurance on the application of the second-mentioned insurer, change his name within a time to be fixed by the Superintendent of Insurance.”

The wording of sub-section (3) is equally important. There we read that “No insurer other than a provident society to which Part III applies, who begins to carry on insurance business after the commencement of this Act, shall adopt as its name, and no such insurer carrying on business before the commencement of this Act shall continue, after the expiry of six months from the commencement thereof, to use as its name any combination of words which includes the word ‘provident’.”

It is, however, further provided that nothing in the section shall apply to any insurer carrying on business before the 27th January, 1937, under the Indian Life Assurance Companies Act, 1912.

From the terms of the foregoing proviso it would seem that the expression “already registered” in sub-section (1) and “previously registered” in sub-section (2) must not be given too narrow a construction, but must be so interpreted as to include statutory registration under any Act requiring a commercial undertaking to be registered, e.g., the Indian Companies Act, 1913, or the Indian Partnership Act, 1932. In the first-mentioned statute, namely, in section 11 thereof, a similar protection to existing undertakings is afforded. It is to be noted that, as any company incorporated in British India will have had to comply with the terms of the last-named Act in the matter of its name, it has nothing to fear from section 5 of the Insurance Act, 1938, so far as a rival company trading in British India be concerned. Nonetheless, its name, as a prospective insurer, may to the unwary beholder be calculated to cause confusion with that of an unincorporated association, a pre-existing partnership, or other proprietary concern.

It remains to point out that by section 67 of the Act, no Provident Society, established after the 1st July, 1939, shall adopt as its name

any combination of words which includes the word "Life"; while any such Society *must* include the word "Provident".

A Provident Society, established before the commencement of the Act is given six months, i.e., up to 1st January, 1940, to regularize itself, if need be, in both the above respects.<sup>1</sup>

The provisions of section 283 of the Indian Companies Act, 1913, make it a penal offence for any person to use the word "limited" as part of a trade name or style unless that person be either a company incorporated in India with limited liability, or if the use of the word or its equivalent be permissible under the law of the country governing its incorporation. The offence may be continuing; and the penalty is Rs.50 for every day on which the word is used in contravention of the statute.

**Appeal.**—By section 110 (1) (a) an appeal lies against an order passed by the Superintendent refusing to register an insurer on the ground of non-compliance with any provision of the statute in the matter of the insurer's name, and also from an order of the Superintendent directing an insurer to change his name. Every such appeal lies to the principal civil Court of original jurisdiction of the district (if outside a Presidency-town) in which the principal office of the company is situate. Where such principal office is situated in a Presidency-town, the appeal lies to the Presidency High Court.

The conditions under which a firm, being an insurer under the Act, may voluntarily change its name in accordance with the provisions of the Act, are the same as those which apply in the case of corporations.

## 8. *Registration*

**Preliminaries to application.**—Before an insurer can apply for registration under the Act, he must have fulfilled the requisite conditions as to Name, Working Capital<sup>2</sup> and Compulsory Deposit. In some instances a deposit has to be made in full; in others it may be made by instalments. The application itself must be accompanied by a number of documents, one of which is a certificate from the Reserve Bank of India setting forth the particulars of such deposit or deposits as have been lodged by the applicant under the provisions of the statute. As the duties devolving on the insurer to qualify for the Superintendent's certificate of Registration are rather more elaborate in the case of a corporation than in (say) the case of a proprietary concern, it is thought sufficient of the purpose of this commentary if what is required of a corporation be described by way of example.

In contemplation of the law of India, corporations aggregate may vary considerably both as to origin and constitution. A corporation may be the creature of a special statute, or of a charter, or may be self-created by the assumption of such powers on the part of its original members as are permitted to them by the law of the land.<sup>3</sup> In the foregoing respects, corporations established under foreign law are recognised by the law of India. Accordingly, the Insurance Act, 1938, expressly includes in its definition of "Insurers", those which in form are corporate bodies organised in accordance with the laws of a foreign country.

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<sup>1</sup> Sec. 67.

<sup>2</sup> Where applicable to him.

<sup>3</sup> Indian Companies Act (VII of 1913), sec. 5.

For practical purposes, the obligations imposed on all "insurers" classified as corporations are very nearly uniform. Where disparity in treatment exists between indigenous and non-indigenous corporations, the same is founded in a corresponding disparity in the treatment accorded to nationals and (Indian) non-nationals in the foreign country, or is plainly conditioned by circumstances peculiar to the individual foreign concern, or to the class of foreign undertakings to which the concern itself belongs.

The statute Law relating to the incorporation in British India of corporations aggregate is the Indian Companies Act (VII of 1913) as amended to 1938.<sup>1</sup> It is thought sufficient for the purposes of the present treatise to remind the student of the respective definitions of a private company and of a public company which are to be found there, and to point out that the notion of "insurer" as defined in the Insurance Act, 1938, includes both the above-mentioned types of corporation.

The definition<sup>2</sup> of a private company as referred to above is as follows :—

- " (13) 'private company' means a company which by its articles—
- (a) restricts the right to transfer the shares, if any; and
  - (b) limits the number of its members to fifty, not including persons who are in the employment of the company; and
  - (c) prohibits any invitation to the public to subscribe for shares, if any, or debentures of the company :

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member "

A public company is defined<sup>3</sup> as meaning "a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, which is not a private company."

**Registration under Companies Act.**—Registration under the Indian Companies Act is compulsory on companies other than those formed in pursuance of an Act of Parliament or some other Indian Law or of Royal Charter or of Letters Patent.<sup>4</sup> It seems that foreign companies (though certainly not expressly mentioned) are exempted from compulsory registration under that Act. Such companies, however, though, in form, registered only in the country in accordance with whose laws they are incorporated, must, in substance, register in British India also, if they shall have established a place of business there on or after 1st April, 1914. For the statute imposes on every such company the duty of filing with the provincial Registrar of Joint Stock Companies all such information relating to itself as substantially corresponds with what is required for purposes of registration in the case of companies incorporated under any of the former Indian Companies Acts. Thereafter, every such company, in connection with such business as it purposes to carry on in British India, must conform to the provisions which are to be found in Part X of the Indian Companies Act, 1913, as now amended.

<sup>1</sup> The principal amending statutes are XXII of 1936, XX of 1937, and II of 1938.

<sup>2</sup> Companies Act, sec. 2 (13).

<sup>3</sup> *Ibid.*, sec. 2 (13A).

<sup>4</sup> *Ibid.*, sec. 4 (2).

As already pointed out, corporations, being insurers, must obtain from the Reserve Bank of India a statement that deposits to the extent required prior to registration have been made.

**The Application.**—What has been said upon this topic in the earlier part of this chapter concerning foreign corporations with regard to the filing of documents applies equally to partnership firms or unincorporated bodies of individuals.

Where the firm is a foreign firm which has established a place of business in British India or which appoints a representative there with the object of obtaining insurance business, there must be filed with the Superintendent of Insurance within three months from the establishment of such place of business in British India or from the date of appointment of such a representative, the following documents :—

- (i) A Certified Copy of the Instrument constituting or defining the firm, which document if not written in English must be accompanied by a Certified Translation thereof.
- (ii) The name and address of some one or more persons resident in British India authorised to accept on behalf of the partnership firm service of process and of any notice required to be served on the insurer under the Act, together with a Copy of the relative Power of Attorney.
- (iii) A Statement giving the full address of the principal office in British India.
- (iv) A Statement of the class or classes of insurance business carried on or to be carried on.
- (v) A Statement, verified by an Affidavit, setting forth the special requirements, if any, of the nature specified in section 62 of the Act imposed in the firm's country of origin on Indian nationals :

and, in the event of any alteration being made in the address of the principal office or in the class or classes of business carried on or to be carried on, or in any instrument hereinbefore referred to, or in the name of any of the persons hereinbefore referred to, or in the matters specified in (v) above, the firm shall forthwith furnish to the Superintendent of Insurance particulars of such alteration. (Section 26.)

### *9. The Certificate of Registration : when may be refused or postponed*

Under the provisions designed to achieve reciprocity of treatment for Indians seeking to carry on insurance business abroad, the Superintendent of Insurance has no option but to withhold registration, or to cancel a registration already made, if he is satisfied that in the country in which the applicant has his principal place of business or his domicile, Indian nationals are disabled by the law or practice relating to or applied to insurance from carrying on such business there. And, generally, upon the Superintendent is imposed a duty to withhold registration in any case in which the conditions precedent to such registration have not been fulfilled. In the case of a Provident Society registration may be refused until the Superintendent is satisfied that the rules of the Society comply with what is laid down in section 74 of the Act.

**When Certificate Obligatory.**—On being satisfied that the applicant for registration has fulfilled all the requirements of the Act which

are applicable to him, the Superintendent of Insurance must forthwith put the applicant's name upon the Register of "Insurers" and shall thereupon grant the insurer the statutory certificate that this has been done.

The statute seems to require an executive act in writing on the part of the Superintendent of Insurance in cases where he is minded either to refuse an application to be put upon the register of insurers, or to cancel a registration of that character already made.

**Appeals.**—Such an executive act is referred to as "an order"; and every such order on the part of the Superintendent of Insurance refusing to register or cancelling the registration of an insurer, as the case may be, is appealable to the principal court of civil jurisdiction within whose local limits the principal place of business of the insurer or the proposed insurer, as the case may be, is situate.<sup>1</sup> And the observations made above as to consequential relief by invoking the appellate or revisional jurisdiction of superior Courts will apply.<sup>2</sup> Section 110 of the Act, by virtue of which, appeals lie from certain decisions of the Superintendent of Insurance to a Court of Justice, does not expressly deal with the case of an insurer who may be domiciled in British India but may have his principal place of business elsewhere, *e.g.*, Burma or Ceylon. In such a case it is thought that the principal civil Court of that place in British India where the proprietor or proprietors reside would assume jurisdiction for the purpose of giving relief under this section.

No appeal is expressly provided against a decision of the Superintendent when exercising his powers under section 3 (6) of the Act to withhold registration of a foreign insurer for want of reciprocal treatment of Indian nationals under the law obtaining in the insurer's or the prospective insurer's country. It may be contended, however, that it was the intention of the legislature to give such an appeal and that the withholding of registration amounts to a refusal within the meaning of section 110.

### 10. *Certain Penal Sanctions*

It may be opportune at this point to note that the statute creates certain penalties of the kind mentioned above for any contravention of the Act on the part of an insurer.<sup>3</sup> Similar penalties are imposed upon certain persons purporting to be insurers within the meaning of the Act but who have failed to obtain registration.<sup>4</sup> The incidence of these penalties which are set forth in sections 102 and 103 of the Act will be explained in greater detail hereafter.

Penalties extending to imprisonment may be inflicted upon those wilfully making a statement false in any material particular, and knowing it to be false, in any Return, Report, Certificate, Balance-sheet or other document required by or for any of the purposes of the Act.<sup>5</sup>

Other offences punishable under the Act are those of wrongfully obtaining or withholding any property of the insurer or wilfully applying

<sup>1</sup> Sec. 110, App. I, p. 1, *post*.

<sup>2</sup> Pp. 512, 513, *ante*.

<sup>3</sup> Sec. 102.

<sup>4</sup> Sec. 103.

<sup>5</sup> Sec. 104.

such property to purposes other than those expressed or authorized by the Act,<sup>1</sup> as also wrongfully diminishing of life insurance fund.<sup>2</sup>

Non-compliance with the provision prohibiting rebates other than those allowed in accordance with the published prospectuses or tables of the Insurer is an offence punishable with fine which may extend to Rs.100 unless committed by a person effecting or renewing a policy in which case his offence is punishable with fine which may extend to Rs.50 only.<sup>3</sup>

## 11. Exemptions

**Total exemptions.**—If, then, the Act creates, as it does, a number of total exemptions from those particular measures of control to which insurers generally are subject, many such are apparent rather than real, where the exempted concerns belong for instance to some class for which Governmental control is otherwise provided. The concerns exempted from the provisions of the Act, are, Trade Unions registered under the Indian Trade Union Act (XVI of 1926); Provident Funds to which the provisions of the Provident Funds Act (XIX of 1925) apply; and, but only if the Superintendent of Insurance exercises his discretion to exempt, and then only to the extent specified in the relative order, (i) any Mutual or Provident Insurance Society, composed wholly of Government servants, which has been exempted from any or all of the provisions of the Provident Insurance Societies Act (V of 1912) and (ii) any fund in existence before 27th January, 1937, and which has been already recognized by the Central Government and which is maintained by or on behalf of servants of Government or of pensioners of Government for the mutual benefit of contributors to the fund and of their dependants. (Section 118.)

**Exemptions.**—The conditions under which foreign insurers who no longer propose to carry on business or a class of business in British India after the 1st of July, 1939, save to the extent necessary for winding up the class of business which they purpose to discontinue, are especially *exempted from the operation of the Act, have been briefly referred to* earlier in the present Chapter (see p. 521, *ante*). They remain outside the operation of the statute so long as they have not on or after the 1st of July, 1939, entered into any "new" contract in respect of the class of business discontinued before that date.

The question must inevitably arise as to what is comprised in the notion of entering into any "new" contracts of that class. The answer presents no difficulty in relation to any class of insurance business which is concerned with property. The question however may be posed whether in regard to life insurance the conversion of a life policy into one of endowment or *vice versa* would be entering into a "new" contract, within the meaning of the section. The answer would appear to depend upon the terms of the policy as issued before the commencement of the Act. If one of its terms provides for conversion on demand or by any other arrangement specified in the instrument no "new" contract would, it is submitted, have been entered into merely by giving effect to one of its stipulations. It would be otherwise if, by an agreement between

<sup>1</sup> Sec. 105.

<sup>2</sup> Sec. 106.

<sup>3</sup> Sec. 41 (2).

the parties, on or subsequent to the 1st of July, 1939, or at any rate carried into effect on or after that date, there were to be an alteration made in the terms of a pre-existing instrument. That, it is submitted, would be to enter into a new contract and would accordingly bring the insurer *ipso facto* within the control of the statute for all purposes.

## 12. Rules

**Statutory.**—In this and the two chapters which follow frequent references are made to the Insurance Rules, 1939. These Rules have been made pursuant to powers created by the Act itself, and for that reason are rightly to be styled statutory rules. The Indian Companies Act to which statute many references are made in this and the succeeding chapters creates similar rule-making powers and the same have been widely exercised. Various other Acts alluded to in the text have also been implemented by statutory rules.

A statutory rule has the force of law, and thus demands as much obedience as anything enjoined by the Act itself. There is, however, one important distinction between a statutory rule and anything enacted in the statute from which it derives. The former may have its validity challenged at any time, while the latter is something which the court called upon to enforce it must assume, if it be a public general statute, to be within the competence of the legislature which purported to make it law. It is otherwise, of course, in the case of a local statute; for there a plea to the competence of the local legislature may be raised.

The validity of a statutory rule may always be questioned, sometimes on the ground that its subject-matter shows it to be outside the purview of the relative rule-making section. (*Institute of Patent Agents v. Lockwood*, [1894] A.C. 347, 359, 360.) It is also liable to be held invalid as being unreasonable, or as being repugnant to the statute relied upon, or to some general principle of law. (*Peck v. North Staffordshire Ry. Co.*, [1863] 10 H.L.C. 473; *Dickson v. G.N.Ry.*, [1886] 18 Q.B.D. 176; *L. & S.W.Ry. v. Hills*, [1906] 15 L.J. K.B. 340.)

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## CHAPTER X

### THE INSURANCE ACT, 1938

#### GOVERNMENTAL CONTROL OF INSURANCE UNDERTAKINGS IN BRITISH INDIA

##### II

##### STATUTORY OBLIGATIONS ARISING AFTER REGISTRATION

1. Preliminary. 2. Immediate obligations:—Registers—Accounts—Separation of accounts—Life Insurance Fund—Other special accounts relating to Life insurance—Audit. 3. Routine Obligations:—Life insurance: actuarial report and abstract—Submission of Returns—Signing of Returns—Additional or alternative Returns by insurers of foreign origin—Compliance with the Indian Companies Act, 1913—Abstract of proceedings—Reports—Position of Lloyd's local agents—Position of partnership firms and individual concerns—Position of Provident Societies. 4. Publication:—By insurers—By Government. 5. Powers of Superintendent to revise and inspect:—As to Returns—As to actuarial investigations or valuations—In the case of Provident Societies—Special inspection—Special aid to investigation. 6. Right of interested persons to copies of documents:—Returns generally—Memorandum and articles—Accounts, statements, abstracts—Provident Societies' documents—Mutual Insurance Companies and Co-operative Life Insurance Societies—Life insurance: questions and answers of proposer. 7. Special provisions concerning assets:—Investment—Statement of investments—Power of Superintendent to verify—Assets, in what name—Exemption of insurers domiciled in Indian States. 8. Forms. 9. Sanctions:—Service of Notices—Penalty for false statement in a document—Wrongfully obtaining or withholding property—Wrongfully diminishing Life Insurance Fund—Loss sustained by insurer or policy-holder—Relief against liability—Cognizance of offences.

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##### 1. Preliminary

One of the principal aims of the Legislature in putting those successive acts upon the statute book which are known as the Indian Companies Acts,<sup>1</sup> from 1860 onwards, has been to ensure the maintenance in each Province of appropriate records exhibiting the business activities and the directorate of every existing company; and for that purpose the records maintained at each such Provincial Registrar's office are open to public inspection.

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<sup>1</sup> A part of the Act today (secs. 277 to 277E) is expressly concerned with "companies established outside British India". Of the foregoing, some five sections were inserted by the amending Act of 1938. They are largely borrowed from an English statute.

Under the Insurance Act, 1938, there is vested in the Superintendent of Insurance a corresponding duty to maintain records, similarly exhibiting the activities of all insurance concerns carrying on business in British India. Such records are equally open to inspection.<sup>1</sup>

The procedure to be followed by companies in respect of making the requisite Returns under the relative provisions of the several statutes is, in many respects, similar; and the underlying purpose may be regarded as the same. The immediate objects to be served, however, are distinct; for which reason, it is by section 117 of the Insurance Act, 1938, expressly provided that an insurer, being a company, is not by anything appearing in the Act, relieved of his duty to comply with the provisions of the Indian Companies Act, 1913, in matters not otherwise specifically provided for by the Insurance Act itself.

It will be observed that the Act imposes upon life insurance concerns the creation of a special fund to be styled "the Life Insurance Fund". A special duty is also imposed in the matter of separation of accounts where the insurer is doing more than one of certain specified classes of business.

The Act condescends to considerable detail in those of its provisions which have been framed to ensure that in the office of the Superintendent will at all times be found sufficient material whereby that functionary can keep in touch with the activities of insurance concerns, and can easily detect any infringement of the insurer's statutory obligations. This is achieved by the provisions concerning systematic Reports and Returns. Over and above the obligations thus imposed, and which may conveniently be styled routine duties, there are other obligations the breach of which could only be detected by inspection. Of such are the provisions touching the maintenance of particular Registers.

In the case of insurers, being companies incorporated in India or in the United Kingdom, the respective statutes applicable to corporations sufficiently provide for the proper auditing of accounts. The Insurance Act, 1938, however, extends to every insurer the obligation to have the relative accounts audited. The provisions touching actuarial reports extend to all insurers carrying on life insurance business.

## 2. Immediate Obligations

**Registers.**—The Act imposes upon every insurer (including Provident Societies) the duty of maintaining a number of Registers.<sup>2</sup> The Act prescribes no particular form. In the case of all insurers the following registers must be opened and regularly maintained:—

(a) of Policies: Here must be entered, in respect of each Policy,<sup>3</sup> (1) the name and address of the policy-holder, (2) the date when the Policy was effected, (3) a record of any transfer, assignment or nomination of which the insurer has notice;

<sup>1</sup> See secs. 15, 16, 20, 86 and 87 of the Insurance Act, 1938.

<sup>2</sup> Secs. 14, 43, 79.

<sup>3</sup> It is conceived that the word "Policy" as used in sec. 14 should there be given a wide interpretation, so as to cover the date from which the liability under the contract attaches. Accordingly it is suggested that in every register of the kind contemplated there should be a column in which the date of any slip or cover-note should be entered, and another column for the date on which the instrument ranking as a Policy of Insurance was actually issued.

(b) of *Claims* : in which must be entered (1) the nature of the claim, (2) the date when preferred, (3) the name and address of the claimant, (4) the date on which the claim was discharged, or (5) the date of rejection, and, in that event, (6) the grounds of rejection ;

(c) of *Agents* : showing (1) the name and address, (2) the date of appointment, and (3) the date on which the contract of agency was for any reason determined.

The registration of licensed agents only is obligatory. Other agents with unexpired contracts are not required to be entered in this register.

In the case of Provident Societies, registers similar to those enumerated under (a), (b) and (c) above are obligatory, though, curiously enough, the relative clause in section 79 prescribes, in the case of the register of agents, no more than the name and address as necessary to proper registration. This, it is conceived, is a mere slip in draftsmanship. Accordingly it is suggested that the date of appointment and all other details shown under (c) above should in fact be made of record.

In addition to the three registers referred to above a Provident Society must maintain a register :—

(d) of *Members* : exhibiting (1) the name, (2) the address, and (3) the occupation (if any).

Within the category of member is to be included a proprietor, director, manager or secretary.

Section 79, which deals with Provident Societies, expressly provides that all the registers enumerated above shall be kept at the society's registered office. There is no corresponding provision in section 14, which deals with insurers in general. This omission is also, it is conceived, a mere slip in draftsmanship. It is submitted that what is intended is that all such registers, in the case of a Company incorporated in British India, shall be kept at the Company's registered office, and in the case of other insurance undertakings, shall be kept at the particular concern's principal place of business in British India.

**Accounts.**—Upon the subject of accounts the policy of the Insurance Act is to secure a large measure of uniformity in method. The relative provisions are to be found partly in the body of the Act, and partly in Schedules I, II and III thereof. By the scheme adopted, however, all insurers are by no means treated alike.

In the case of Provident Societies the Act condescends to considerable detail, going, indeed, so far to lay down that such societies shall maintain:—

(1) *A Cash Book* : wherein shall be entered "all sums received and expended", together with a proper reference to the relative subject-matter. It is further provided that there shall be separate entries for each class of "contingency specified in section 65".

In the last-named section the relevant contingencies are set forth under some seven heads, namely, (a) the birth, marriage, or death of any person, or the survival by any person of a stated age or of some other specified contingency; (b) failure of issue; (c) the occurrence of a social, religious or other ceremonial occasion; (d) loss of, or retirement from, employment; (e) disablement in consequence of sickness or accident; (f) the necessity of providing for the education of a dependant; and (g) any other contingency which may be prescribed or which may be authorized by the Provincial Government with the approval of the Central Government.

(2) *A Ledger*; and

(3) *A Journal*.

The Act is silent upon the question of account books in the case of other insurers coming under the statute; but it is evident from the terminology used, that the legislature contemplates the maintenance of such account books as are customary in modern commercial undertakings.

The Act condescends to more detail in dealing with statements of account; and to the relative provisions in that regard attention will now be directed.

Corporations constituted under the Indian Companies Act, including subsidiary companies (but not including an insurer recognised as a local agent of Lloyd's) must prepare at the expiration of each calendar year certain statements of account in respect of all insurance business transacted.<sup>1</sup> These are:—

(1) *A Balance Sheet*: in the manner shown in Form A which will be found at the head of Part II of the First Schedule. The balance sheet must be prepared with an eye to the nine special regulations which figure as Part I of that Schedule

(2) *Profit and Loss account*: This account will be prepared in the manner shown in Form B or C of Part II of the Second Schedule, and in accordance with the three special regulations appearing in Part I of that Schedule. The obligation to compile a profit and loss account applies to all Indian Companies carrying on more than one class of insurance business. Those whose sole concern is with life, fire, or marine insurance are specifically exempted.

(3) *A Revenue Account*. The prescribed form is Form D in Part II of the Third Schedule and the account must be prepared in accordance with the ten regulations set out in Part I of that Schedule.

Companies incorporated elsewhere than in British India and all other insurers not included in the categories immediately above-mentioned are to prepare Statements of Account on precisely similar lines, but, naturally, in respect only of the business done by them in British India.

Accounts of any company which, prior to the commencement of the Act, has prepared the particular balance sheets and other accounts in accordance with what is laid down in the *Indian Life Assurance Companies Act, 1912*, or which has based its accounts upon the financial year, i.e., the year ending 31st of March, may be accepted, so long as a direction in that regard is obtained from the Central Government. Permission to use this alternative period for accounting purposes is only available to such insurers for a space of time sufficient to enable them to readjust themselves in that regard to the new scheme prescribed by the Act.

Partnership concerns having their principal place of business in British India, or proprietary concerns whose owners are domiciled in British India, must prepare statements of account on lines precisely similar to those enumerated above.

The statements of account compiled by companies to which the Indian Companies Act applies will be signed in accordance with the provisions of that Act. In the case of all other companies, they must be signed by the chairman, if any, as well as by two directors and the principal officer of the company. In the case of a firm, such accounts must be signed by at least two of the partners.

<sup>1</sup> Sec. 11.

**Separation of Accounts.**—Insurers other than those concerned solely with life, fire or marine, or solely with accident or miscellaneous insurance (including workman's compensation and motor car insurance) are required to keep separate accounts of all receipts and payments in respect of each class of insurance business with which the undertaking is concerned.<sup>1</sup> Rule 27 of the Insurance Rules provides that :—"Every insurer, so long as he has policies on the dividing principle remaining in force, shall submit all Returns required under the Act or these rules in respect of such business separately from the corresponding Returns in respect of other insurance business, and along with the revenue account shall also furnish, in respect of such business, Returns in Forms XII, XIII and XIV, respectively. Four copies shall be submitted of each of these three last-mentioned returns."

**Life Insurance Fund.**—The notion of insisting upon a fund to be styled "The Life Insurance Fund" is borrowed from insurance legislation in England. A Life insurance fund in England is the creation of section 3 of the Assurance Companies Act, 1909 (9 Edw. VII, c 49). By that section it was enacted that every company carrying on the business of life insurance should open and maintain a fund to be so styled. Section 10 (2) of the Indian Insurance Act, 1938, is in terms more or less similar to those used in the corresponding provision of the English statute.

By the Indian statute the duty is imposed of opening and maintaining a separate fund to be called The Life Insurance Fund. As a matter of book-keeping, the statutory deposit made by the insurer in respect of life insurance business must be credited to this fund, inasmuch as by the terms of the relative enactment such deposit is to be deemed a part thereof. To the account so to be maintained is to be carried any excess of receipts over payments in respect of life insurance business transacted.

The purpose of the fund is sufficiently shown by the terms of sub-section (3) of section 10. That sub-section reads as follows:—

"The life insurance fund shall be as absolutely the security of the life policy-holders as though it belonged to an insurer carrying on no other business than life insurance business and shall not be liable for any contracts of the insurer for which it would not have been liable had the business of the insurer been only that of life insurance and shall not be applied directly or indirectly save as provided in section 49 for any purposes other than those of life insurance."

By section 49 of the Act, to which reference is thus made, an insurer, being a company incorporated under the Indian Companies Act or which is a partnership firm domiciled in India or which has its principal place of business there, is prohibited in respect of any life insurance business respectively to declare or to pay any dividend to shareholders or any bonus to policy-holders except out of a surplus ascertained as the result of an actuarial valuation of the assets and liabilities of the insurer.

It may here be useful to refer to two English decisions as illustrating the uses to which such a life insurance fund may be put. In the first of these cases (*In re British Union and National Insurance Company, Ltd.*, [1914] 1 Ch. 724) Astbury, J., held that the statutory deposit forming part of the life insurance fund of a company whose insurance business included life, fire and accident risks, was a security for the "life" policy-holders only; that it was not a security for any other class of creditors,

<sup>1</sup> Sec. 10 (1).

even those having special claims against the particular section of the company's business which concerned itself with life insurance. He held however, that, subject to the claims of the life policy-holders, the statutory deposit was part of the general assets. Three years later, Neville, J. (*In re National Standard Life Assurance Corporation*, [1917] 1 Ch. 193) had before him the claim of a liquidator to resort to the statutory deposit made by an insurance company whose business was largely life insurance, in order to satisfy the costs of the liquidation proceedings. While holding that the effect of section 3 of the English Assurance Companies Act, 1909, was "that persons who have contracted with the company on a different basis from that of life assurance are not entitled to have payment of their claims out of the Life Insurance Fund, which is the security of the life policy-holders", the learned Judge (at page 198) continued, "I cannot see anything in that to prevent the Fund being applicable for the purpose of liquidation of a life assurance company where that company is being wound up."

**Other special accounts relating to Life Insurance.**—As will be seen hereafter, the Act imposes upon an insurer carrying on life insurance business in India the duty of providing for a periodical investigation into his affairs by an actuary. Where such an investigation into the financial condition of such an insurer is made as at a date other than the expiration of the year of account, the accounts for the period since the expiration of the last year of account and the balance sheet as at the date at which the investigation is made, shall be prepared and audited in the manner provided by the Act.<sup>1</sup> The statutory requirement as to audit generally will next be described.

**Audit.**—The policy of the Act is to enforce upon every insurer the proper auditing of the various statements of account previously mentioned. Inasmuch as companies incorporated in India are obliged by the Indian Companies Act to adopt similar measures, the Insurance Act, 1938, imposes no fresh duties of that character. In the case, however, of insurers other than companies incorporated in India, a special audit is required<sup>2</sup> of the balance sheet, profit and loss account, revenue account and the profit and loss appropriation account.<sup>3</sup>

The relative section provides that the auditor "shall in the audit of all such accounts have the powers of, exercise the functions vested in, and discharge the duties of, and be subject to the liabilities and penalties imposed on, auditors of companies by section 145 of the Indian Companies Act, 1913." An auditor failing in his duty under the last-mentioned section is, by sub-section (5) thereof, liable to be fined. It is a breach of duty if he be knowingly and wilfully a party to any default on the part of those who themselves have duties to perform under the foregoing section of the Companies Act.

By these means the statute achieves uniformity in statements of account, and places the responsibility for their accuracy upon a number of shoulders; while at the same time securing to every insurer the necessary technical advice and assistance which the auditor is thus enjoined to furnish.

Directors of joint-stock companies are, in these days in India, sufficiently conversant with the principles governing a proper and sufficient

<sup>1</sup> Sec. 12 (5).

<sup>2</sup> Sec. 12.

<sup>3</sup> The form prescribed for this latter account is Form C of Part II of the Second Schedule.

auditing of companies' accounts to need no comment upon the same in any treatise such as the present. Auditing in India, however, is nothing like so general in the case of partnership firms, and it is still rare in the case of business undertakings owned by single individuals.

### 3. *Routine Obligations*

**Life Insurance : Actuarial Report and Abstract.**—The policy of the Act, amongst other things, is concerned to secure regular actuarial investigation of the affairs of insurers under the Act who are carrying on the business of life insurance in India. To that end it is provided in section 13 that in respect of all such business there shall be an investigation of that character every five years at least. Some insurance concerns, as the statute contemplates, will certainly be employing actuaries for some such purpose at much shorter intervals, *e.g.*, annually, or whenever such an investigation becomes necessary with a view to distribution of profits.

The actuarial examination of the financial condition of the concern must include a valuation of the insurer's liabilities. The actuary will naturally make a Report to the Management, and from that Report the statute requires an Abstract to be made in accordance with the special regulations set forth in Part I of the Fourth Schedule to the Act. That Schedule contains some five regulations the last of which is definitive. The Abstract must have, as annexures thereto, some five Tabular Statements namely:—

(1) *a Consolidated Revenue Account*, in Form G as annexed to Part II of that Schedule, for the inter-valuation period: except that it shall not be necessary to prepare such an account in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an Abstract in respect of that class of business; and

(2) *a Summary and Valuation* (in Form H, which follows) of the policies included at the valuation date in the class of business to which the Abstract relates; and

(3) *a Valuation Balance Sheet* (in Form I); and

(4) *a Statement* (in Form DDD) of the additions to, and deductions from, the number of policies, and the sums insured thereunder for each class of life insurance; and

(5) *a Statement* (in Form DDDD) of particulars of policies forfeited or lapsed under each class of life insurance.

The essential features of the Abstract itself, as required by the statute, are to be found in the special rules set forth in Part II of the same Schedule.<sup>1</sup>

There is next to notice the provisions as to yet a further Statement, which must accompany the Abstract and all the before-mentioned annexures. This Statement, if the actuarial investigation be made annually, need not be furnished annually. It is a sufficient compliance with the requirements of the statute if it be got out and furnished every five years, when, in any event, an Abstract of the actuarial Report must, as already mentioned, be furnished. The Statement itself is to be appended to the Abstract and must be prepared in tabular form, and must contain certain prescribed information concerning the life insurance business actually in

<sup>1</sup> Pages lxxvi et seq., post. And see under actuarial investigations, etc., at p. 545, post.

force at the date to which the accounts have been made up for the purposes of the Abstract. The character of the information necessary for that purpose is to be found in the Fifth Schedule to the Act. The Statement must be drawn in conformity with the six rules to be found in Part II of that Schedule, and with an eye to the five special regulations concerning the same matter which figure in Part I thereof.

**Submission of Returns.**—All the foregoing audited Accounts and Statements referred to in section 11 as well as the Abstract and Statement referred to in section 13 are to be printed and four copies must be furnished as "Returns" to the Superintendent of Insurance within six months from the end of the period to which they refer.<sup>1</sup> The relative section permits the Superintendent to extend the time for furnishing such Returns by a further period not exceeding three months. Moreover, insurers having their principal place of business or domiciled outside India, as also British companies and partnership undertakings carrying on business outside as well as within British India, have nine months in all within which to furnish the aforesaid Returns.<sup>2</sup>

**Signing of Returns.**—Of the four copies so to be furnished, one, in the case of a company, must be signed by the chairman and two directors as well as by the principal officer; and, if the company has a managing director or managing agent, by that director or managing agent. In the case of a firm, the Return must be signed by at least two partners. In the case of an insurer being an individual, the insurer himself must sign.<sup>3</sup>

**Additional or alternative Returns by insurers of foreign origin.**—

(a) *Insurers domiciled outside British India or having their principal place of business there.* Where under the law of the country in which such an insurer is constituted, incorporated or domiciled, he is required to file with some public authority of that country such documents as a balance sheet, a profit and loss account, or revenue account or documents in the nature of a valuation report or valuation statement, copies of any such documents must be furnished to the Superintendent of Insurance in India along with the statements of account already referred to. In this manner the Superintendent in India can satisfy himself that such a foreign undertaking is not giving one picture of its affairs to its home country and another to the statutory authority in India. Where, however, such an insurer is not by the foreign law required to furnish documents of the character mentioned, he must file with the Superintendent of Insurance in India a Certified Statement showing his total assets and liabilities at the close of, and his total income and expenditure during, the period covered by the Statements of Account otherwise furnished to the Superintendent as enumerated above.

(b) *Insurers of foreign origin who have their principal place of business in British India* are called upon to make Returns of a special character, where such insurers happen to be, under the foreign law, required to furnish to a public authority documents substantially of the same nature as the returns mentioned above.

Such insurers must make these special Returns within six months calculated from the end of the period to which they refer.<sup>4</sup> The special

<sup>1</sup> Sec. 15 (1).

<sup>4</sup> Sec. 16 (1).

<sup>2</sup> Proviso to sec. 15 (1).

<sup>3</sup> Sec. 15 (3).

Returns are enumerated in sub-section (2) of section 16 of the Act. These are:—

(1) 4 certified copies in the English language of every Balance Sheet, Account, Abstract, Report and Statement supplied to the public authority of the country in which the insurer is constituted, incorporated or domiciled, as the case may be.

(2) 4 certified copies in the English language of a Statement (audited by a person duly qualified under the law of the insurer's country) showing the assets held by the insurer in India.

(3) For each class of insurance business carried on, 4 certified copies of a Revenue Account, compiled in the manner and in the relative forms which are shown in Part II of the Third Schedule of the Act, and similarly audited. Such Accounts must be compiled in accordance with the regulations set forth in Part I of that Schedule. Details in respect of each class of business transacted in India must be shown separately.

(4) 4 certified copies in the English language of an Abstract from the relative valuation report in respect of all Life insurance business transacted by the insurer in India. This will be prepared in the manner prescribed by section 13 (1) of the Act to which attention has already been drawn.

(5) 4 certified copies in the English language of a Declaration in the prescribed form stating that all amounts received by the insurer, directly or indirectly, whether from his head office or from any other source outside India, have been shown in the Revenue Account, except such sums as properly appertain to the capital account.

Unhappily there is no such "prescribed form" in any of the Schedules to the Act. The necessity of properly specifying this class of income is emphasised in Note (e) appended to Form D, shown in Part II of the Third Schedule. All that appears to be requisite, however, is a statement that the requirements of this Schedule in respect of revenue account has been complied with, by the inclusion of the items specifically mentioned under item (5) above.<sup>1</sup> The declaration might, it is thought, be set out at the foot of the Revenue Account.

**Compliance with the Indian Companies Act, 1913.**—To prevent overlapping and to mitigate hardship to insurers, being companies incorporated in India, there is a sensible provision<sup>2</sup> whereby, instead of furnishing to the Registrar of Joint-Stock Companies accounts and balance sheets in strict accordance with section 134 of the Indian Companies Act, 1913, copies of the accounts and balance sheet as furnished to the Superintendent of Insurance may be filed with the Registrar of Joint-Stock Companies, and the same shall be regarded as compliance with section 134 (1) of the Indian Companies Act.

**Exemption:** No insurer is exempted from the necessity of submitting accounts and a balance sheet. But by section 17A an exemption is conferred upon all insurers in respect of the preparation, audit and submission for any accounting year which has expired before the 1st April, 1939. For such a year it will suffice if the accounts and balance sheet be prepared, audited and submitted in accordance with the law previously in force.

**Abstract of proceedings.**—Insurance companies incorporated in India are required by section 19 of the Act to furnish to the Superintendent an abstract of the proceedings of every general meeting. This

<sup>1</sup> What is stated under (5) above is taken directly from sec. 16 (2) (d).

<sup>2</sup> Sec. 17.

document must reach the Superintendent within thirty days from the date on which the relative meeting was held.<sup>1</sup>

In this connection it should be noted that, by section 100 of the Insurance Act, Mutual Insurance Companies and Co-operative Insurance Societies are permitted an alternative, and obviously less expensive, method of sending out notices, and of calling the attention of their members to the audited balance sheet, revenue account and other kindred documents, than is provided by the provisions of the Indian Companies Act, 1913.<sup>2</sup> The privileged corporations mentioned above may, instead of sending the notices and the copies of the balance sheet, revenue accounts and other documents which they are required to send to their members under sections 79 and 131 respectively of the Indian Companies Act, publish such notices or documents once in a newspaper published in the English language, and once in a newspaper published in an Indian language, circulating in the place where the principal office of the company or society is situated: provided that, where any of its members are domiciled in a province other than that in which such principal office is situated, the publication of the aforesaid notices shall be made in a newspaper or newspapers published in the principal languages of that province and circulating therein. Though not very happily worded, the intention of the proviso appears to be to make it obligatory on the company or society, if and when adopting this alternative method of publication, to publish its notices and the copies of the other statutory documents mentioned above in the newspapers of every province in which one or more of its members reside.

**Reports.**—Section 18 of the Act imposes upon all insurers the duty of furnishing to the Superintendent a certified copy of every report on the affairs of the concern which may be submitted to the members or policy-holders thereof. The statute insists that such a copy shall in every instance be furnished "immediately after" its submission to the members or policy-holders, as the case may be.

**Position of Lloyd's local agents.**—The student will have appreciated from the description above given of the obligations imposed as a matter of routine upon insurers generally, that the position of a local agent of Lloyd's is not different from that of any other insurer. If the agency be held, for example, by a company or firm incorporated or domiciled, as the case may be, in India, the provisions relating to insurers so placed will apply. Similarly, if the agency be held by a firm or a corporation of foreign origin, the corresponding obligations already described for an insurer so situated will be applicable. Where the agency is held by an individual insurer the agent has only to comply with what is required of other individuals so placed.

**Position of partnership firms and individual concerns.**—In the matter of routine obligations under the Act, partnership firms or individuals, domiciled or having their principal place of business in British India, will act in conformity with what is required of companies so placed. Similarly, what is required of companies of foreign origin is required of partnership firms or individuals in a corresponding position.

<sup>1</sup> Sec. 10.

<sup>2</sup> See Indian Companies Act, 1913, secs. 79 (1) (b) and 131 (3).

**Position of Provident Societies.**—The position of Provident Societies is in some sense peculiar. The Act places them in two groups. A Provident Society which pays or undertakes to pay on any policy of insurance an annuity exceeding Rs.50 or a gross sum exceeding Rs.500 (exclusive of any profit or bonus) is, in matters of accounting, actuarial investigation, as also in all routine matters concerning Returns, placed in the same position as any other insurer whose status is that of a corporation. Consequently in all such matters, and save to the extent already noticed in this Chapter, the provisions concerning them which appear in Part II of the Act, apply to such Provident Societies. All other Provident Societies capable of being registered under the Insurance Act, 1938, are in respect of the aforementioned matters made the subject of special provisions which are to be found in Part III of the Act.<sup>1</sup> It is those special provisions relating to Provident Societies of the last-named category to which the readers' attention is now directed.

- (1) *Accounts and annual statements.* What is required<sup>2</sup> is:—
  - (i) a Revenue Account and Balance Sheet in the prescribed form and verified in the prescribed manner.<sup>3</sup>
  - (ii) a Report on the general state of the society's affairs.
  - (iii) a Statement showing separately for each class of contingency:—
    - (a) the number of new policies effected, the total amount insured thereby, and the total premium income received in respect thereof, and the number of existing policies discontinued during the year with the total amount insured thereby, and
    - (b) the total amount of claims made and the total amount paid in satisfaction thereof.
  - (iv) a Statement showing details of every insurance effected on a life other than the life of the person insuring.
  - (v) a Statement showing the total amount paid as allowances to agents and canvassers.

The statute requires the accounts to be prepared for each calendar year, and the Statements and Reports to cover the same period. Provident Societies, however, already registered under the Provident Insurance Societies Act, 1912,<sup>4</sup> may, for the first two years after the commencement of the Insurance Act, 1938, continue to use the financial year for the above purposes.

(2) *Separation of accounts.* Where the society effects policies of insurance in connection with more than one class of contingency,<sup>5</sup> separate accounts must be kept in respect of each class. (See section 84.)

(3) *Audit.* The provisions as to audit are identical with those already described in the case of other insurers.

(4) *Quinquennial Report and Abstract.* Unless the rules of the particular society provide for actuarial examination into its affairs at any shorter interval, the Act requires such an investigation to be made every five years at least.<sup>6</sup> The investigation contemplated will include

<sup>1</sup> Sec. 66. (But see proviso.)

<sup>2</sup> By sec. 80.

<sup>3</sup> By Rule 20 of the Insurance Rules, 1939, these must be prepared in accordance with Forms VII and VIII; and strict regard must be paid to the instructions appearing thereon.

<sup>4</sup> Act V of that year.

<sup>5</sup> The contingencies are to be found in sec. 65. They have already been set out at page 533 of this Chapter.

<sup>6</sup> Sec. 81.

valuation of liabilities and assets. The actuary is required to report upon and compile an Abstract therefrom in which shall be stated:—

- (a) the general principles adopted in the valuation, including the method by which the valuation age of lives was ascertained,
- (b) the rate at each age of the mortality and any other factor assumed and the annuity values used in valuation,
- (c) the reserve values held against policies effected,
- (d) the rate of interest assumed, and
- (e) the provision made for expenses.

Appended to the foregoing Report and Abstract must be a Certificate, signed by a principal officer of the society, to the effect that all necessary materials have been placed at the actuary's disposal, and that full and accurate particulars of every policy under which there exists an actual or contingent liability have also been furnished to the actuary.

(5) *Special duty of actuary.* Should any such actuarial investigation show that the financial condition of the society is such that no surplus exists either for distribution as bonus to the policy-holders, or as dividend to the shareholders, a duty is cast on the actuary to state in his report whether, in his opinion, the society is insolvent, and if so, whether it should be wound up or not. The actuary should also state the extent to which, in his opinion, existing contracts should be modified, or existing rates of premium adjusted, so as to make good the deficiency in the assets.<sup>1</sup>

(6) *Returns.* All the foregoing documents mentioned are to be regarded as Returns which apparently must be furnished to the Superintendent of Insurance in original.<sup>2</sup>

The society must have its materials ready for actuarial examination within three months from the end of the period to which such materials relate. The Actuarial Report and Abstract mentioned above must be furnished to the Superintendent within the period of three months thereafter.<sup>3</sup>

Provident Societies incorporated as companies under the Indian Companies Act may avail themselves of the same privilege as has been described in relation to other companies so situated, namely that the *filing with the Registrar of true copies of balance sheets, etc.,* furnished to the Superintendent of Insurance is to be deemed a sufficient compliance with the provisions of section 134 of the Companies Act.<sup>4</sup>

(7) *Actuarial examination of schemes.* Part III of the Act contains important provisions<sup>5</sup> touching a thorough examination by an actuary of each and every scheme of insurance which a Provident Society has already in operation or proposes to put into operation.

The main safeguard created by these provisions, read as a whole, is that an actuarial certificate as to the soundness of any new scheme is made a condition precedent to the legality of continuing the scheme or of putting it into operation, as the case may be.

Looking at these provisions in more detail,<sup>6</sup> the student will note:—

(i) That no premium or contribution in connection with a new scheme may be received by Provident Societies until the actuary's certificate shall have first been obtained and forwarded to the Superintendent of Insurance.

<sup>1</sup> Sec. 81 (3). The actuary must report in the manner prescribed by Rule 21 (see p. xvii, *post*).

<sup>2</sup> Sec. 82.

<sup>3</sup> Sec. 82 (2).

<sup>4</sup> Sec. 82 (3).

<sup>5</sup> Sec. 83.

<sup>6</sup> See sec. 83 (1) (6).

(ii) That, in the matter of existing schemes, any proposed alteration is made subject to the scrutiny of the Superintendent, who may prohibit it if, in his opinion, the proposed alteration is such as unfairly affects the interests of the existing policy-holders.

In this connection it is to be observed that the society, if met with such a prohibition by the Superintendent, may yet proceed with the altered scheme, if it first discharge, to the satisfaction of the Superintendent, all liabilities to policy-holders dissenting from the alteration.

(iii) That all pre-existing schemes on the part of a society registered under Act V of 1912 must, within six months from the commencement of the Insurance Act, 1938, submit every such scheme to actuarial examination; and that it is the duty of the actuary to report thereon and of the society to furnish the Superintendent with (apparently) the original of every such report.

(iv) If the actuary called upon to investigate an existing scheme reports it as actuarially unsound, the Superintendent is obliged to prohibit the further operation of the scheme; and the society should not receive any premium or contribution or effect any policy in connection with the prohibited scheme after the expiry of one month from the date of prohibition.

The society thereafter shall, where its assets are sufficient for the purpose, set apart out of such assets a sum sufficient in the opinion of the actuary to meet the liabilities incurred under the discontinued scheme. Where, however, its assets are not sufficient, the society must, within three months from the date of discontinuance, make an application to the Court praying for an order modifying its existing contracts or, in the alternative, for the winding up of the society.

(8) *Special duty of actuary.* Where no routine actuarial investigation into the Society's affairs shall have taken place within two years preceeding the date on which the actuary may be called upon to examine some existing or proposed scheme, the actuary must include in his report on that scheme his opinion as to whether the assets of the Society are sufficient to meet its liabilities under all the existing schemes, and, if not, how, in his opinion, the existing contracts should be modified.<sup>1</sup>

#### 4. Publication

**By Insurers.**—It is forbidden to insurers to publish in British India any Return in a "form" other than that in which it has been furnished to the Superintendent.<sup>2</sup> In this connection it is important to remember that the word "Return" within the meaning of the relative sections comprises audited accounts and statements required by section 11 as well as the abstract and any of its annexures and appended statements rendered obligatory by section 13 of the Act, as also any of the special accounts, statements, abstracts and declarations required in the case of certain foreign concerns and which are dealt with in section 16 (2) of the statute.

It is permissible, however, for an insurer to publish for purposes of commercial publicity a true and accurate *abstract* from any document coming within the category of a return, as understood by the statute. It is thus evident that what is intended is to permit insurers to publish

<sup>1</sup> Sec. 83 (4).

<sup>2</sup> I.e., secs. 24 and 25; in the first-named the word "return" expressly, and in the second-named section impliedly, comprises all documents of the kind indicated above.

any part of such a return, so long as the part published be itself accurate; but that any attempt to summarise the return as a whole or in part would constitute an infringement of the prohibition as to "form". So much for the rights of publication accorded to insurers themselves.

**By Government.**—The Act, however, makes it a matter of obligation on the Central Government<sup>1</sup> to cause to be published annually, and in such manner as that Government may direct, its own summary of the accounts balance sheets, statements, abstracts and other returns furnished under the Act, or purporting to have been so furnished to the Superintendent. The publication so enjoined on the Central Government refers to the returns for the year preceding the year of publication. The statute permits Government to append to these annual publications any note of its own and to include any correspondence relating to the matters published.

### 5. Powers of Superintendent to revise and inspect

The statute gives to the Superintendent very wide powers for the purpose of securing accuracy in the information furnished to him in any return or actuarial report. The relative sections in that regard applicable to insurers other than Provident Societies are sections 21, 22, 33 and 34; while those relating to Provident Societies are sections 86 and 87.

**As to Returns.**—Should it appear to the Superintendent that any return is inaccurate or defective, he may —

(i) require the insurer to furnish supplementary information or to correct information already supplied. In this connection the Superintendent is empowered to demand that the correction of supplementary information be certified either by an auditor or by an actuary;

(ii) serve a Notice on the insurer calling upon him to produce for his examination at the insurer's principal place of business in British India any book of account, register or other document, or supply any statement specified in the Notice;

(iii) examine any of the insurer's officers on oath in relation to any return.

The Superintendent is furthermore entitled by the express terms of clause (d) of section 21 (1) to decline to accept any Return which, in his opinion, appears inaccurate or defective in any respect, unless such inaccuracy shall have been corrected, or the deficiency supplied, before the expiry of one month calculated from the date on which the Superintendent has delivered to the insurer a requisition calling upon the latter to correct the inaccuracy or supply the deficiency, as the case may be.

If, in the circumstances named above, the Superintendent exercises his right to decline to accept any Return, the statute provides that the insurer is to be deemed to have failed to comply with the provisions of section 15 or 16 of the same, as the case may be.

**Appeal.** The section permits the insurer, if dissatisfied with the exercise of the Superintendent's powers in the above regard, to move the Court for a direction on the Superintendent to accept such return or returns as the Superintendent may have refused to accept, or for an order cancelling any order passed of the character described under (i), (ii) or (iii) above. Such an application must be made on Notice to the

<sup>1</sup> Sec. 24.

Superintendent, who may be heard, and the statute places upon the insurer the *onus* of satisfying the Court that the action complained of was in the circumstances unreasonable.

**As to actuarial investigations or valuations.**—If in the opinion of the Superintendent it appears that an actuarial investigation or valuation of the kind above described<sup>1</sup> does not properly indicate the condition of the affairs of an insurer by reason of the faulty basis adopted in the relative valuation, he may serve upon the insurer a Notice calling upon him to show cause why a further investigation and valuation should not be made at the insurer's expense by some actuary appointed by the insurer for the specific purpose and approved by the Superintendent. The relative section provides that the insurer is to be given an opportunity of being heard before any order directing such further actuarial investigation be made. It is important to notice that the only ground upon which the Superintendent may exercise his power to have a further actuarial investigation made is "the faulty basis" adopted for the purposes of the valuation in the first instance.

**In the case of Provident Societies.**—The kindred provisions relating to Provident Societies as to inspection and enquiry by the Superintendent are not in similar terms, and accordingly need special description.

By section 86 it is made obligatory on every Provident Society to keep its books at all reasonable times open to inspection by the Superintendent or by any person appointed by him to inspect them. The section also empowers the Superintendent to give permission to any member or policy-holder of a Provident Society, pursuant to a proper application to him in that behalf, to inspect the society's books; and such permission must be honoured by the society.

The statute, by section 87, imposes upon the Superintendent the duty of visiting, personally or by deputy, the principal office of every Provident Society at least once in every two years, for the purpose of enquiring into the solvency of the society and the manner in which its business is conducted. He may, indeed, make such a visitation at any time. He may also serve upon the society a Notice giving it an opportunity to show cause why he should not direct an enquiry of the above character to be made by an auditor or an actuary appointed by him in that behalf.

The results of any such enquiry as mentioned above, whether made by himself or by his deputy (including any auditor or actuary specially appointed for the purpose) must be recorded in a special Report and the same must be kept in the Superintendent's office. A copy of every such Report is to be sent to the Society concerned.

**Appeal.** By section 110 (1) (c) the statute provides an appeal against an order by the Superintendent directing an enquiry under section 87 by an auditor or actuary. The appellate tribunal is the Court.

**Special Inspection.**—Over and above the casual or routine investigations of which mention has been made in the foregoing parts of this Chapter, the statute provides for a *special investigation* into the state of an insurer's business. Such an investigation (which in the caption

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<sup>1</sup> Namely one under sec. 13, as to which see p. 537, *ante*.

to sections 33 and 34 is designated an "inspection") may only be carried out in the particular events contemplated by the statute. These are:—

(i) if the Superintendent has reason to believe that the interests of the policy-holders are in danger; or

(ii) if he has reason to believe that an insurer is unable to meet his obligations; or

(iii) if he has reason to believe that an insurer has made default in complying with any of the provisions of the Act; or

(iv) if he has reason to believe that an offence under the Act has been, or is likely to be, committed by an insurer or any officer of an insurer; or

(v) if the Superintendent receives a requisition for such an inspection signed by shareholders of an insurance company not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the capital; or

(vi) if the Superintendent receives a similar requisition signed by not less than fifty life policy-holders, holding policies which have been in force for three years or more, and which are of a total value amounting to not less than Rs.50,000. Note, however, that every such requisition, whether by shareholders of an insurance company, or by policy-holders of a life-insurance concern, must be supported by an affidavit.

*Nature of proceedings.* The proceedings contemplated by the statute enable the inspector to examine on oath any person who is or has been an officer of the insurance concern in relation to its business; and makes it obligatory on all such persons who are or have been such officers to produce all books and documents in their custody or power which relate to the insurer's business; while it makes any person refusing to produce any book or document which it is his duty to produce, or who declines to answer any question relating to the insurer's affairs, liable to a penalty in the nature of a fine not exceeding Rs.50 in respect of each offence. The relative section<sup>1</sup> further provides that all expenses of and incidental to such an investigation shall be paid by the insurer.

The results of any investigation made pursuant to the special powers of the Superintendent mentioned above must be embodied in a report, of which one copy is to be furnished to the insurer concerned, the other being made of record in the office of the Superintendent.

Consequent upon the result of any such investigation as is contemplated by section 33, the Superintendent may require the insurer concerned to comply, within a time to be specified in the relative Notice (not being less than 15 days from the receipt of such Notice), with any direction which may be issued towards remedying the defects disclosed by the investigation.<sup>2</sup>

*Appeal.* An insurer aggrieved by any proceeding or threat of any proceeding by way of special investigation under section 33 may move the Court for an order forbidding the action complained of. The application must be made on Notice to the Superintendent and the relative provisions of the statute in this regard places upon the insurer the *onus* of satisfying the Court that the action complained of was, in the circumstances, unnecessary.

**Special aid to investigation.**—The ordinary course of business which insurers, established in British India, must needs pursue are such

<sup>1</sup> Sec. 34, attracting the provisions of sec. 140 of the Indian Companies Act, 1913.

as would, in that regard, present no obstacle to any of the prescribed investigations or other controls contemplated or created by the statute. It might be otherwise with insurance concerns doing business in British India, but established or constituted outside this country. Consequently the legislature has thought fit to make special provisions for any such possibility. Reference is here made to section 64, whereby it is enacted that every insurer having his principal place of business or domiciled outside British India, shall keep at his principal office in British India such books of account, registers and documents, as will enable a proper compilation to be made of the accounts, statements and abstracts required of him by the Act, and to aid the Superintendent in checking them.

#### *6. Right of interested persons to copies of documents*

**Returns generally.**—The statute regards the public generally as potentially interested in every Return furnished to the Superintendent under its provisions. Accordingly it enacts, firstly, that such Returns, or certified copies of them, shall be open to general inspection at the office of the Superintendent; and, secondly, that anyone may procure a copy of any such Return, or any specified part thereof, on payment. The requisite fee is calculated at six annas per hundred words or any fractional part thereof: any five figures counting as one word.<sup>1</sup>

**Memorandum and Articles.**—The same section imposes on insurance companies the duty of supplying to any policy-holder, properly applying therefor, a copy of the memorandum and articles of association of the company, on payment of a fee of one rupee.

**Accounts, Statements, Abstracts.**—In the matter of accounts, statements and abstracts compiled and furnished to the Superintendent in accordance with the provisions of sections 15 or 16 of the Act, any policy-holder may, at any time within two years from the date when any such document was filed, apply to the insurer for a printed or certified copy of the same. It then becomes obligatory on the insurer to meet the applicant's requisition either within 14 days after the insurer is constituted, incorporated, or domiciled in British India, or, if received later than that, then within one month of the date of the application. A similar application may be made by any shareholder of an insurance company; and such an application must be met by the company within similar respective periods. In the case of a special investigation made under section 23, and pursuant to a requisition by policy-holders, copies of the relative Report must be furnished to the policy-holders concerned, whether a special application in that regard be made or not.

**Provident Societies' documents.**—Similar provisions have been made in the case of Provident Societies<sup>2</sup> in respect of all statutory Returns and Reports, whereby any member or policy-holder may, within two years of the date when the relative document was filed, make an application for a copy, which must be furnished to him within 14 days from the receipt of his application, on payment of a fee of one rupee.

<sup>1</sup> Sec. 23 provides that any return furnished to the Superintendent, once it has been certified by him, shall be deemed to be a return so furnished; and copies certified by him are to be receivable in evidence as if originals, unless variation from the original be proved.

<sup>2</sup> Sec. 82 (1).

The Report of any Inquiry, whether routine or special, of the character contemplated by section 87 of the Act, is to be open to inspection at the office of the Superintendent to any member or policy-holder of the society concerned. There is no provision, however, entitling a member or policy-holder to obtain a copy of the Report, either from the Superintendent or from the Society itself.

Any member of the public is entitled by the statute<sup>1</sup> to a copy of the Rules of any Provident Society on payment of a sum not exceeding a rupee, and every member of a Provident Society may on demand be furnished with a copy free.

**Mutual Insurance Companies and Co-operative Life Insurance Societies.**—By section 101 of the Act any member of a Mutual Insurance Company or of a Co-operative Life Insurance Society may make demand to the company or society respectively for a copy of any document furnished to the Registrar of Companies under the provisions of section 134 of the Indian Companies Act, or to the Registrar of Co-operative Societies of the province in which the Co-operative Life Insurance Society is registered; and a copy of any document specified in the relative requisition must be furnished to the member within 14 days of his application. The application itself must, however, be made within two years of the date when the relative document was filed with the particular Registrar concerned.

**Life Insurance : questions and answers of proposer.**—Policy-holders of Life Insurance concerns are by section 51 of the Act entitled on payment of a fee not exceeding one rupee to be supplied with a certified copy or copies of any questions put to them together with the answers thereto (where incorporated in the relative proposal), or which appear in the medical report in connection therewith.<sup>2</sup>

### 7. Special Provisions concerning assets

**Investment.**—Certain insurers are required to invest and to hold invested a proscribed amount of their assets.

*In the case of a Provident Society*, unless it already holds invested in Government securities or in securities mentioned or referred to in section 20 clauses (c) and (d) of the Indian Trusts Act (II of 1882) to the extent of 50% or more of its total assets, the Society must invest all surplus assets in such securities until the amount so invested reaches a sum representing not less than 50% of its total assets.<sup>3</sup> That ratio of invested, to total, assets, once reached, must not be lowered.<sup>4</sup>

Save in the case of the statutory deposit made under section 73 of the Act all funds or investments of a Provident Society must be kept in the name of the Society.<sup>5</sup>

*The other insurers*, the investment of whose assets, in a proscribed manner, is made a matter of statutory obligation, are those carrying on the business of life insurance. In their cases the relative provisions are rather more complicated.

(i) *Every life insurer incorporated or domiciled in British India or incorporated in or domiciled in the United Kingdom* is required at all times to invest and hold invested assets, equivalent to not less than 55% of the sum of (a) the amount of his liabilities to policy-holders in India on

<sup>1</sup> Sec. 75.

<sup>2</sup> Questions put to a life who is not the policy-holder are outside the privilege.

<sup>3</sup> Sec. 85 (1).

<sup>4</sup> *Ibid.*

<sup>5</sup> Sec. 85 (2).

account of matured claims, and (b) the amount necessary to meet the liability on policies maturing for payment in India: after deducting from that total sum, firstly, the statutory deposit in respect of that class of insurance business, and, secondly, the sum total due to the insurer in respect of loans granted by him on policies. It is laid down in the relative section that the manner of the investment will be as follows namely:—

- (a) 25% in Government securities,
- (b) 30% either in Government securities, or other approved securities or any securities guaranteed as to principal and interest by the Government of the United Kingdom.

(ii) *An insurer incorporated or domiciled elsewhere than in British India or the United Kingdom* must at all times invest, and hold invested, assets equivalent to the figure representing his total liabilities as calculated under (i) above.

Of the assets so to be invested 33½% must be invested in Government securities, and the balance invested in the manner prescribed under (i) above.

*Time given to pre-existing insurers.* An insurer who was already carrying on life-insurance business in British India when the Insurance Act, 1938, came into operation, is given a period of four years, calculated from the commencement of the Act, within which to carry out the prescribed investment of assets, i.e., 55% of the total sum as above calculated, as the case may be. During the aforesaid period he must achieve investment of one-quarter before the end of the first year, raising the same to not less than one-half before the end of the second year, and raising again the sum invested to not less than three-quarters by the end of the third year.<sup>1</sup>

(iii) Insurers incorporated in British India, one-third or more of whose share capital is owned by individuals domiciled elsewhere than in British India or the United Kingdom, or whose governing body consists to the extent of one-third of such foreigners, are required to invest to the extent and in the manner shown under (ii) above.

*Particular Trusts.* Insurers falling within the categories shown under (ii) and (iii) above must place the assets which are required to be so invested in the hands of trustees: such trustees to be resident in British India, and to be approved by the Central Government. Every such statutory trust must be effected by a proper instrument to be approved by the Central Government: which instrument shall define the manner in which alone the subject-matter of the trust shall be dealt with. The investments so made are to be held in trust for the discharge of matured claims, as well as to meet all other liabilities on policies maturing for payment in India.

**Statement of Investments.**—Every insurer carrying on the business of life insurance (not being a Provident Society) must twice in every year, namely, within 14 days of the 30th of June and within 14 days of the 31st December, furnish the Superintendent with a statement showing, as at the said dates, the assets held invested in accordance with the provisions of section 27. Every such statement must be certified by the insurer's principal officer.

**Power of Superintendent to verify.**—For the purpose of verifying for himself how far the provisions of section 27 in the matter of invest-

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<sup>1</sup> Sec. 27 (3).

ment have been complied with, the Superintendent is given the widest possible powers: the operative words in the relative sub-section entitling him "at any time to take such steps as he may consider necessary for the inspection or verification of the assets"; and the insurer is enjoined strictly to meet every requisition made by the Superintendent to that end.<sup>1</sup>

**Assets, in what name.**—Except those assets which consist of deposits lodged with the Reserve Bank of India, or which may be vested in trustees, all assets must be kept in the corporate name of the undertaking, if a company; if a firm, then in the name of the partners; if an individual, then in the name of the proprietor.

**Exemption of insurers domiciled in Indian States.**—By section 116 the Central Government may, by notification in the official gazette, exempt any insurer constituted, incorporated or domiciled in an Indian State from the provisions of section 7 or section 98 relating to deposits or those contained in section 27 (2) relating to the keeping of assets in India. Such exemption may be either absolute, or subject to such conditions, or modifications as may be specified in the relative notification.

The reference to the particular sections mentioned above has the effect of bringing not only ordinary insurers, whether corporations, partnership concerns, or single individuals, domiciled in an Indian State, but all Provident Societies there as well as all Mutual Insurance undertakings and those concerns similarly situated which would be within the definition of a Co-operative Life Insurance Society as given in section 95 (1), clause (b) of the Act. There is nothing in the Act to indicate the circumstances under which foreign insurance concerns so situated would be afforded exemptions not granted to other non-British Indian undertakings. Consequently nothing but experience will show to what extent, if at all, British Indian commercial interests may be adversely affected by such exemptions. Presumably any such exemption would be contrary to the policy out of which is some day to arise a Federated India; but, as already observed in the previous Chapter of this treatise, the Act does not appear to envisage Federation.

## 8. *Forms*

Every insurer registered under the Act must deposit and keep deposited with the Superintendent copies of all standard forms of policy issued by him in India.<sup>2</sup>

The Central Government may, on the application by an insurer (not being a company) or of its own motion, but with the consent of the insurer concerned, alter the forms set out in the various Schedules to the Act, for the purpose of adapting them to the circumstances of the particular insurer and in respect of the business of that insurer only.<sup>3</sup>

## 9. *Sanctions*

**Service of Notices.**—The relative section in this regard may be set out *in extenso*:—

"111. (1) Any process or notice required to be served on an insurer or Provident Society shall be sufficiently served if addressed to

<sup>1</sup> Sec. 28 (2).

<sup>2</sup> Sec. 119.

<sup>3</sup> Sec. 115.

any person registered with the Superintendent of Insurance as a person authorised to accept notices on behalf of the insurer or Provident Society and left at, or sent by registered post to, the address of such person as registered with the Superintendent of Insurance.

(2) Any notice or other document which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy are usually sent and any notice so addressed and sent shall be deemed to be a notice to the holder of such policy:

Provided that, where any person claiming to be interested in a policy as transferee, assignee or nominee has given to an insurer or to a Provident Society notice in writing of his interest, any notice which is by this Act required to be sent to policy-holders shall also be sent to such person at the address specified by him in his notice."

**Penalty for false statement in a document.**—The relative penal section is section 104 and is in these words:

"Whoever, in any return, report, certificate, balance sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to one thousand rupees, or with both."

**Wrongfully obtaining or withholding property.**—By section 105 any director, managing agent, manager or other officer or employee of an insurer who wrongfully obtains possession of any property of an insurer, or who, having such property in his possession, wrongfully withholds it, or wilfully applies it to purposes other than those expressed or authorised by the Act, becomes liable, on the complaint either of the insurer or of any member or of any policy-holder, to be punished with a fine which may extend to Rs. 1,000. By the same section the Court disposing of any such complaint may order the offender to deliver up or to refund within a time which the Court may itself fix, any property thus wrongfully obtained or dealt with. In default of compliance with any such order the offender may be imprisoned for any period not exceeding two years.

**Wrongfully diminishing Life Insurance Fund.**—By the provisions of section 106, a special sanction is created in protection of the Life Insurance Fund of which mention has been made above.

If the Court, properly promoted in that behalf, is satisfied that there has been a diminishing of any life insurance fund consequent upon any contravention of the Act; every person who at the time of such contravention was a director, manager, liquidator or any other officer of the insurer, shall be deemed in respect of such contravention to have been guilty of misfeasance<sup>1</sup> in relation to the insurer concerned, unless such person establishes that the contravention occurred without his consent

<sup>1</sup> The word comes to us from the French and out of the Latin. Literally it means "misdoing", in the sense of committing a wrongful act; and its original connotation was trespass. Gradually it became more and more associated with the notion of an improper performance of a lawful act, usually importing negligence. There is authority for suggesting that now-a-days sins of omission as well as those of commission are within the concept of "misfeasance", as a term of art. (See *per* Kekewich, J., *Re Liverpool Household Stores*, 59 L.J.Ch. 617, commenting on *Re Wedgwood Coal Co.*, 47 L.T. 612.)

or connivance and was not facilitated by any neglect or omission on his part.

The proceedings may be initiated on the application either of an insurer, or of any member of an insurance company, or of any policy-holder, or of the liquidator of an insurance company (where the same is in liquidation). For the purpose of disposing of an application under this section the Court is endowed with all the powers of which a Court is possessed when acting under sections 235 and 237 of the Indian Companies Act, 1913. The Court is further specially empowered by the terms of section 106 of the Insurance Act, 1938, to assess the sum by which the life insurance fund has been depleted, and to order any person found guilty of the misfeasance alleged to contribute to that fund by way of compensation either the whole or any part of the sum so assessed.

No proceedings of the character contemplated by section 106 can be initiated unless the applicant shall have first received the sanction of the Advocate-General of the Province in which the insurer's principal place of business in British India is situated.<sup>1</sup> (Section 107.)

**Loss sustained by insurer or policy-holder.**—It is important to notice yet another sanction imposed by the statute to meet cases where, by breach of the statutory directions concerning the investment of assets (section 27), or of those touching loans (section 29), any loss has been occasioned either to the insurance concern itself or to any policy-holder. In such a case it is provided<sup>2</sup> that every director, manager, managing agent, officer or partner who is knowingly a party to the particular breach, shall (without prejudice to any other penalty to which he may be liable under the Act) be jointly and severally liable to make good the amount of such loss.

**Relief against liability.**—Wide powers are provided by the Act whereby honest officials who have acted reasonably may obtain some measure of protection against the extremity of those penal sanctions which are the creation of the statute. The powers of relief with which a Court is entrusted in such circumstances are contained in section 108.

**Cognizance of offences.**—No Court inferior to that of a Presidency Magistrate or a Magistrate of the 1st Class, may try any offence under the statute. (Section 109.)

The statute provides no appeal from a conviction of any offence. It is submitted, however, that a High Court may be moved in its Revisional Jurisdiction against the judgment of any inferior Court trying an offence under this Act, upon any ground alleging an error of law or an erroneous decision upon a mixed question of law and fact.

<sup>1</sup> Many Provinces have no such officer. Perhaps the sanction of the senior Government Pleader or Advocate practising in the local High Court or before the Court of a Judicial Commissioner would, in any such case, suffice.

<sup>2</sup> By sec. 30.

# CHAPTER XI

## THE INSURANCE ACT, 1938

### GOVERNMENTAL CONTROL

#### III

1. Preliminary. 2. Provident Societies:—The new legislation—Rules—Registered office—Publication of authorized and subscribed capital. 3. Mutual Insurance Companies and Co-operative Life Insurance Societies:—Nature of Mutual insurance—Co-operative Insurance Societies. 4. Amalgamation and transfer of business:—Amalgamation or transfer by private arrangement—Sanction of the Court—Scheme open to inspection—Procedure in Court—Amalgamation or transfer before registration—Statements to be lodged with the Central Government. 5. Winding up:—Insurance Companies, (a) By the Court, (b) Voluntary, (c) Under the Court's supervision—What companies may be wound up under the Act—Primary and Secondary Companies—Alternative to winding up of Life Insurance Companies—Reduction of contracts—Who may apply—Affairs of insurers other than companies—Valuation of assets and liabilities, (a) Life Insurance business, (b) Business other than life insurance—Separate valuation for Life Insurance—Procedure as to *prima facie* surplus—Partial winding up—Return of deposits—Notice of, and right to dispute, valuation. 6. Dissolution of Provident Societies:—Winding up—The alternative to winding up—Appointment of liquidator—Powers of liquidator—Books—Taking charge—Ascertainment of liabilities—Notice—Persons interested to be bound by notice—Statutory Meetings—To whom applications are made—Disposal of application—Subsequent statutory meeting—Committee of inspection—Return of compulsory deposit—Administration and distribution of assets—Liquidator may be guided by Companies Act—Penal sanctions—Proceedings after winding up—Final statutory meeting—Proceedings after final statutory meeting—Declaration of dissolution, and discharge of liquidator—Unclaimed monies.

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#### 1. Preliminary

The present Chapter is devoted to a number of topics to which not more than a passing reference seemed necessary for the objects aimed at in previous Chapters of this treatise. It remains to notice certain provisions of law which peculiarly concern societies which are to be classified as Provident Societies, or which concern Mutual Insurance Societies or Co-operative Insurance Societies only. There will then—if our commentary upon the Insurance Act, 1938, is to be in any sense complete—remain two other topics affecting all classes of insurers eligible for registration under the statute. In so saying reference is, in the first place, intended to those provisions of the Act which relate to the amalgamation or transfer of one insurance concern to or with another similar undertaking, as the case may be; and, in the last place, to the machinery which is created by the statute for the purpose of "winding-up".

2. *Provident Societies*

The so-called Provident Society of modern times is a specialized form of what used to be called a Friendly Society. The first of such societies originated in England in the seventeenth century. Its object was definitely insurance.<sup>1</sup> As already pointed out, the original Friendly Society was only one of many institutions having kindred aims which gradually became serious rivals to the private insurer. In course of time societies of this type, formed for the mutual aid of their own members *only, attained such numbers and importance that it became necessary to devise special legislation for their registration and control.* In 1896, there was passed in England the Friendly Societies Act<sup>2</sup> which grouped such societies, according to their principal objects, into five categories for the purposes of definition. The Friendly Society was therein defined as one created "for the purpose of providing, by voluntary subscriptions of the members thereof, with or without the aid of donation, for

- (a) the relief or maintenance of the members, their husbands, wives, children, fathers, mothers, brothers or sisters, nephews or nieces, or wards being orphans, during sickness, or other infirmity (whether bodily or mental), in old age (which shall mean, any age after 50), or in widowhood, or for the relief or maintenance of the orphan children of members during minority; or
- (b) insuring money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child, of a member, or for the widow of a deceased member, or (as respects persons of the Jewish Persuasion) for the payment of a sum of money during the period of confined mourning; or
- (c) the relief or maintenance of the members when on travel or search of employment, or when in distressed circumstances, or in case of shipwreck, or loss or damage of or to boats or nets; or
- (d) the endowment of members, nominees of members, at any age; or
- (e) the insurance against fire (to any amount not exceeding £15) of the tools, or implements of the trade or calling, of the members:

Provided that a Friendly Society which contracts with any person for the assurance of an annuity exceeding £50 per annum, or of a gross sum exceeding £200, shall not be registered under this Act."

By the time the notion of insurance had spread to India, the principles of mutual insurance, and the machinery created by the Friendly Societies in aid of their members had taken a firm hold in Great Britain and her colonies, as well as in parts of the Continent of Europe and in America. The reader, perhaps, will have noticed that of the nineteen insurance undertakings enumerated in Chapter I of this treatise<sup>3</sup> as

<sup>1</sup> See Chapter 1, p. 5.

<sup>2</sup> 59 & 60 Vict., c. 25. There had been legislation concerning Friendly Societies in England in 1875, 1887, 1889 and 1895. Such societies still play a most important part in the national life. They are now governed by a series of Statutes passed between 1923 and 1929. (Industrial Assurance Act, 1923; Industrial Assurance (Juvenile Societies) Act, 1926; and the Industrial Assurance and Friendly Societies' Act, 1929.)

<sup>3</sup> See p. 9.

having been established in India between 1847 and 1899, no fewer than sixteen embodied the principle of mutual insurance, or indicated by their name the concept of the Friendly or Provident Society as we now know it. Three indeed include the word "Provident" in their name.

In 1912, the Indian legislature enacted the Provident Insurance Societies Act (V of that year) wherein a Provident Insurance Society was defined as "any person who, or body of persons, whether corporate or unincorporate which, receives premiums or contributions for insuring money to be paid on the birth, marriage, or death of any person or on the happening of such other contingency or class of contingency as may be prescribed." The power to prescribe additional contingencies or classes of contingencies, and thereby to extend the application of the Act to the receipt of premiums or contributions appropriate to the particular contingency so introduced, was conferred on local Governments by section 24 of that Act.

By section 5 every Provident Insurance Society was required to make rules, to a free copy of which every member was entitled; and such rules were required to specify the object of, and the name and registered office of, the society; to prescribe the proportions of the annual income derived from premiums or contributions which might properly be disbursed for the expenses of management; and, in the case of a society which by rule or practice divided any part of its funds, the society's rules were to provide for the payment of all debts by the society existing at the time of the division, before any such division could take place.

Every pre-existing Provident Insurance Society was allowed three months within which to bring itself within the provisions of the Act and to get itself registered. Any Provident Society thereafter coming into existence was to register and otherwise fulfil the conditions prescribed by the statute.

**The new legislation.**—By section 123 of the Insurance Act, 1938, the whole of the Provident Insurance Societies Act, 1912, has been repealed, though much of the wording of the repealed statute has been re-enacted.

If the student will compare the definition of a Provident Society in section 65 of the Insurance Act, with the definition of a Friendly Society under the English Act of 1896,<sup>1</sup> he will see that the Provident Society under the law of India today takes the place, and is intended to fulfil the functions, of the Friendly Society of former times. He will note also that the provisions of section 66 of the Insurance Act, 1938, excludes from the definition of a Provident Society under the Act any association which holds itself out as insuring or paying annuities above a specified sum, just as the proviso to the definition under the English statute excludes insurance of that kind above a specified figure.

The provisions of Part III of the Insurance Act, 1938, upon the subject of Working Capital, as also those relating to Compulsory Deposits, have already been noticed in the present treatise.<sup>2</sup> They mark a considerable improvement upon anything attempted in previous legislation. It remains to draw attention to what the Insurance Act, 1938, has to say upon the subject of a Provident Society's rules.

**Rules.**—It must be remembered that the rules of a Provident Society are intended to provide for matters which, in the case of a trading corporation registered under the Companies Act, or of a society

<sup>1</sup> See Appendix I, pp. xxiv-v, *post*, and p. 554, *ante*.

<sup>2</sup> See Chapter IX, pp. 508, 520, *ante*.

registered to promote charitable objects or those of a scientific, literary, or artistic nature under the Indian Statute XXI of 1860, are covered by its Memorandum and Articles of Association. Accordingly, as a primary measure of control, the statute condescends to prescribe a number of matters which must be dealt with by a Provident Society's own set of rules. The relative sections are 74 and 75. To the provisions of these sections must be added those contained in Rule 19 of the Insurance Rules. To sub-rule (2) thereof has been relegated the function of repealing all rules made by virtue of section 24 of the Provident Insurance Society's Act, 1912.<sup>1</sup>

**Registered office.**—Section 77 of the Insurance Act, 1938, for all practical purposes re-enacts the provisions of section 12 of the Provident Insurance Societies Act, 1912, and makes it obligatory on every Provident Society to maintain and register an appropriate office on the outside of which must be displayed in a conspicuous position the Society's name rendered in legible characters. The section also imposes upon a society the duty of giving Notice to the Superintendent of any change in the location of its office within 28 days of the occurrence of any such change.

**Publication of authorized and subscribed capital.**—It is incumbent upon a society from time to time to publish by Notice or advertisement, or in some other official manner, a Statement of the amount of its authorized capital. Wherever such publication is made, the statute insists that such a Statement shall include the amount of capital which has been subscribed, showing also the amount actually paid-up.<sup>2</sup>

### 3. *Mutual Insurance Companies and Co-operative Life Insurance Societies*

The Insurance Act, 1938, relegates such of its provisions as concern Mutual Insurance Companies and Co-operative Life Insurance Societies only to a special part of the statute. This is Part IV, which consists of six sections. These have been referred to in earlier parts of this treatise. It is thought therefore that no further commentary upon those sections is necessary. It may be, however, that the student reader has no very distinct idea—despite the definitions contained in section 95 of the Act—of what constitutes the essential features of Mutual Insurance or Co-operative Insurance. It is to be noticed that whereas a Mutual Insurance Company must be registered under one of the Indian Companies Acts (and therefore becomes amenable to the provisions of that Act as well as to those affecting it in the Insurance Act, 1938), a Co-operative Life Insurance Society is one which is either registered under the Co-operative Insurance Societies Act, 1912, (which statute is neither repealed nor amended by the Insurance Act, 1938) or which is the creature of some provincial statute governing the registration of Co-operative Societies. Both types of body corporate are founded for the benefit of their members only; and no one but a member can be a policy-holder.

**Nature of Mutual Insurance.**—The essence of mutual insurance is an agreement between the members that each shall contribute upon a prescribed basis to the claims of all other members. As already remarked, associations of people bound by a common agreement, i.e.,

<sup>1</sup> Appendix II, p. xxi, *post*.

<sup>2</sup> Sec. 78.

contracting with one another, in the aforesaid manner and for the aforesaid purpose, was a very early development in the history of insurance in Europe. The common law of England did not regard such an association as a corporation at all, nor did it create such rights for the members *inter se* as arise in the case of an ordinary common law partnership. It was decided that the liability of its members was several and not joint, and was limited to that proportion of any claim preferred which, under the relative rules, a member had agreed to bear. See *Re London Marine*, [1869] 8 Eq. 176; *Re Great Britain Mutual Life*, [1880] 16 Ch.D. 246. In *Tyser v. Shipowners' Syndicate*, [1896] 1 Q.B. 135, and *Leo Steamship Co. v. Corderoy* decided in the same year (1 Com. Cas. 379 at 381), the presumption was held to be that a mutual insurance company was an association of individual insurers with individual liability only.

If such an association consist of more than twenty persons it must, if it is to be recognised, have registered itself under one or other of the Indian Companies Acts, unless it is a joint family carrying on a joint-family trade or business. The relative sub-section of section 4 of the Indian Companies Act is, for all practical purposes, *totidem verbis* section 4 of the English Companies Act of 1862, reproduced as section 1 of the English Companies Act, 1908, and again as section 357 in the Act of 1929. By the provisions of all these "no company, association or partnership consisting of more than twenty persons" was to be formed for the purpose of carrying on any business that had for its object "the acquisition of gain by the company association or partnership or by the individual members thereof," unless registered as a company under the Act. The following cases may be referred to as establishing the principle that a Mutual Insurance Society or Association, the members of which pay a deposit, and who by the rules are severally liable to contribute rateably to losses, is an association of persons "carrying on a business whose object is the acquisition of gain to the individual members:" *Re Padstow Total Loss*, [1882] 20 Ch.D. 137; *Re Arthur Average Association*, [1875] L.R. 10 Ch. 542; *Cornish Mutual v. Inland Revenue*, [1926] A.C. 281.

The Insurance Act, 1938, recognises as *companies* only such Mutual Insurance Companies as have registered themselves under one of the Indian Companies Acts. The liability of the members in such cases will be found expressed in the articles. There is, of course, nothing to prevent an association of this kind bringing itself within the Indian Partnership Act, 1932; and in every such case the Insurance Act, 1938, will regard the association not as a company but as a partnership concern.

**Co-operative Insurance Societies.**—It is to be noticed that the Act of 1912 keeps alive<sup>1</sup> every existing society which had been registered under the Co-operative Credit Societies Act of 1904. The objects for which a Co-operative Society under the Act of 1912 had been incorporated, as also the conditions under which it purposed to achieve those objects, and by which its business to that end is conducted, are to be found, not in a Memorandum and Articles, as in the case with Mutual Insurance Companies, but in what are styled Rules and Bye-laws: which Rules and Bye-laws, by section 16 of the Co-operative Societies Act, 1912, are to be kept open at the registered address of the society for the inspection of the public, free of charge, at all reasonable hours.

It is lastly to be noticed that the Insurance Act, 1938, is only concerned with such Co-operative Societies as by their rules and bye-laws hold

<sup>1</sup> By sec. 49.

themselves out as willing to assure the lives of their members. Co-operative Societies so positioned become, by virtue of the provisions of section 95 of the Insurance Act, "Co-operative Life Insurance Societies" within the meaning of that Act; and, as such, they cannot carry on the business of life insurance after the date prescribed by the Act without registering themselves thereunder. Every such pre-existing society is allowed one year in which to comply with the provisions of the law and is obliged, during that period so to amend any rule or bye-law, made under the Co-operative Societies Act, 1912, or under whatever Provincial Act has given it birth, as the case may be, as to see that no such rule conflicts with its duties under the Insurance Act, 1938, or with any statutory rule made and published thereunder. To that extent the provisions of the Insurance Act, 1938, must be taken as over-riding anything in the before-mentioned statutes.

#### 4. *Amalgamation and transfer of business*

The main purpose of the Insurance Act, 1938, being the control of insurance undertakings in British India, it should never be a matter of indifference to the Central Government that registered insurers should transfer their undertakings one to another or in any way amalgamate. Accordingly we should expect to find in the statute appropriate provisions to enable Government to keep an eye on events of this character; as also in some measure to control such amalgamations or transfers as might otherwise have the effect of sacrificing the interests of policy-holders to those of shareholders or others. The legislature, not unmindful of these dangers, has enacted special provisions to deal with them. These are to be found in sections 35 to 37. The student will observe that the statute permits, in general, the acquisition of one insurance business by another by means of ordinary contract as well as the amalgamation of two or more concerns by private treaty. In certain instances, however, the statute interferes, and insists that the amalgamation or transfer proposed shall be submitted for the approval of the Court.

**Amalgamation or transfer by private arrangement.**—On an amalgamation taking place between any two or more insurers, or where any business of one insurer shall have been transferred to another, the insurer carrying on the amalgamated business or the insurer to whom the business is transferred, as the case may be, must within three months calculated from the date when the amalgamation or transfer shall have been completed furnish to the Central Government a number of documents specified in section 37. These are:—

(1) a certified copy of the agreement or deed under which the amalgamation or transfer has been effected.

(2) a document styled a *declaration*, wherein must be stated the nature of every payment made on account of the particular amalgamation or transfer, together with the name of the payee or payees and concluding with a Declaration that to the best of the declarant's belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer has been included and fully set forth, and that no other payment beyond those so set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer.

(3) certified copies of the statements of the assets and liabilities of all the insurers concerned.

(4) certified copies of the actuarial or other reports upon which the agreement or deed was founded.

It is evident from the nature of the document<sup>1</sup> described under (2) above that everything falling within the legal concept of "consideration" must be declared. The requisite Declaration must be signed by every insurer concerned. In the case of a company, the signatures must be those of the Chairman and the principal officer.

The intention of the legislature in regard to amalgamation and transfer by private arrangement would thus appear to be to provide for no more than a record of the circumstances under which such a transfer of interests in insurance concerns has been carried out. The statute makes no provision for any corresponding record to be furnished to the Superintendent of Insurance; nor does it confer a right on any one to inspect the documents so to be filed with the Central Government. Moreover, save to the extent mentioned in the next succeeding paragraph, Government does not assume any power to interfere with the private arrangements of the parties concerned in any such transfer or amalgamation of interests. It is submitted therefore that no such private arrangement, once completed, could be attacked under the statute.

**Sanction of the Court.**—Certain classes of insurers carrying on the business of life insurance in British India are prohibited by the statute from transferring under private arrangement those interests to any other concern, and from amalgamating their business in life insurance with that of any other undertaking. The prohibition does not necessarily extend to the whole of an insurer's undertaking, but only to that part of it which is concerned with life-insurance business. The classes of insurers affected by the prohibition are partnerships or individually-owned concerns domiciled in British India, or having their principal place of business there, and insurance companies incorporated in British India.<sup>2</sup>

Insurers so placed are required, by section 35 of the Act, to prepare a formal scheme and submit the same to the Court having jurisdiction over some one of the insurers concerned. The scheme so to be prepared must set out the terms of the agreement under which the transfer or amalgamation is proposed to be effected, and must clearly show all further provisions necessary to give effect to it.<sup>3</sup>

Before any such scheme can be laid before the Court the following procedure must be followed:—

(1) The Central Government must be notified of the intention to transfer or amalgamate. The requisite notice must be served at least two months before the Court can be moved.

(2) The notice must be accompanied with a statement indicative of the nature of the amalgamation or transfer proposed, as the case may be, and giving also the reasons which underlie the proposal.

(3) Together with the notice and the aforesaid statement must go certified copies of the following documents:—

(i) A draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer.

(ii) Statements of the assets and liabilities of all insurers concerned in such amalgamation or transfer.

<sup>1</sup> See sec. 37, cl. (b).  
<sup>2</sup> Sec. 35 (1) and (2).

<sup>3</sup> Including Subsidiary Companies.

- (iii) The actuarial or other reports on which the scheme is founded, including a report by an independent actuary<sup>1</sup> on the proposed amalgamation or transfer.

It would appear that the course of action laid down above is a duty which devolves upon every insurer whose life-insurance business is to be the subject of transfer. It would also appear that in the case of two insurers proposing to amalgamate, the onus of furnishing the requisite information to Government is shared by every party to the arrangement, who must thus independently furnish the requisite information.

**Scheme open to inspection.**—By sub-section (3) of section 35 a duty is imposed upon every insurer concerned in a transaction involving transfer or amalgamation of life-insurance business to maintain copies of the documents furnished to Government, not only at his principal office in India, but in all his branch offices and with his chief agencies in India, and to keep the said documents open for the inspection of his members and policy-holders for the space of two months preceding the date contemplated for making the requisite application to the Court.

**Procedure in Court.**—On the making of the application for sanction of any such scheme as is contemplated by the statute, the Court has a discretion to direct that a notice of the application be sent to every holder of a life policy concerned who is resident in British India or in any Indian State. The Court is enjoined to cause a statement of the nature and terms of the proposed amalgamation or transfer to be published in such manner and for such period as it may direct. Any director, any policy-holder, and any other person considering himself interested, may apply to be heard before the Court passes any order on the application. Directors and policy-holders so applying are entitled to be heard.<sup>2</sup> Such other persons may be heard as the Court considers to be so entitled. If, after hearing all such persons as either are, or by the Court are considered to be entitled to be heard, the Court is satisfied that there is no sufficient objection to the arrangement, it may sanction the same.<sup>3</sup>

**Amalgamation or transfer before registration.**—Where the proposal to transfer or amalgamate life-insurance businesses carried on by the concerns contemplated by section 35 is made before some one or other of the contracting parties shall have become a registered insurer under the Act, the insurer so placed may apply to the Court for additional time to be allowed him for registration and for the payment of the first instalment of the compulsory deposit. The right to make such an application is, however, confined to concerns which shall within three months of the commencement of the Act, have made the requisite application to transfer or amalgamate, as the case may be. Where, therefore, the last-named application is made in time, the Court has a discretion to extend the time allowed for registration and for the payment of the first instalment of the deposit for such period, not exceeding nine months, as the Court may think fit.<sup>4</sup>

**Statements to be lodged with the Central Government.**—On a sanctioned transfer or a sanctioned amalgamation having taken place, the insurer carrying on the amalgamated business or the insurer to whom the business is transferred, as the case may be, must within three months from the date when the amalgamation or transfer, as the case may be,

<sup>1</sup> The Act and Rules are silent as to the conditions under which such an actuary is to be appointed or by whom.

<sup>2</sup> Sec. 36.

<sup>3</sup> Sec. 36.

<sup>4</sup> Sec. 35 (4).

shall have been completed, furnish to the Central Government the same two kinds of documents as are mentioned under (1) and (2) in the case of insurers effecting transfers or amalgamations under private arrangements only.<sup>1</sup>

### 5. Winding up

It may strike the Indian student that the expression "winding up" with which he probably becomes for the first time acquainted in connection with the mechanism of a clock or watch, where it is used of the process designed to make the thing work, is an odd one to use elsewhere for a process designed to bring the activities of a going concern to an end! The fact is, however, that this expression in the latter sense is nearly a hundred years older than its customary use in connection with clocks and watches and other such machinery. It seems likely that it originated in the notion of coiling or tying a strand of rope so as to arrest the activities of someone or to hold something in position. At any rate, to speak of "winding up" the affairs of a business concern is to use a metaphorical expression traceable in England as far back as 1640. It has today almost acquired the dignity of a term of art so far as the law relating to companies be concerned.

In the Insurance Act, 1938, a group of sections, namely 53 to 61, is devoted to the topic of the winding up of insurance companies and to proceedings by way of insolvency in the case of partners or individual proprietors. In Part III of the Act, which concerns Provident Societies, a further group of sections, namely 88 to 93, is devoted to the same topic.

**Insurance Companies.**—Insurance companies incorporated under the Indian Companies Act, 1913, are, naturally, amenable to the provisions of that Act in the matter of the winding up of their affairs. That Act, in section 155, contemplates three modes by which the affairs of a company may be wound up, namely (1) a liquidation by the Court, (2) voluntary liquidation, and (3) a liquidation carried out under the supervision of the Court.

(a) *By the Court.* By section 53 (2) of the Insurance Act, 1938, additional grounds are provided whereby the Court's power to order the winding up of an insurance company may be invoked. The sub-section reads:—

"(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of an insurance company—

- (a) If with the sanction of the Court previously obtained a petition in this behalf is presented by shareholders not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital, or by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees; or
- (b) if the Superintendent of Insurance, who is hereby authorized to do so, applies in this behalf to the Court on any of the following grounds, namely:—
  - (i) that the company has failed to deposit or to keep deposited with the Reserve Bank of India the amounts required by sections 7 or 98,

<sup>1</sup> Sec. 37.

- (ii) that the company having failed to comply with any requirement of this Act has continued such failure for a period of three months after notice of such failure has been conveyed to the company by the Superintendent of Insurance,
- (iii) that it appears from the returns furnished under the provisions of this Act or from the results of any investigation made thereunder that the company is insolvent, or
- (iv) that the continuance of the company is prejudicial to the interests of the policy-holders."

(b) *Voluntary.* The Indian Companies Act, 1913, in section 203 thereof contemplates three circumstances as entitling a company to wind up its affairs voluntarily. These are:—

- "(1) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
- (2) if the company resolves by special resolution that the company be wound up voluntarily;
- (3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up

and the expression 'resolution for voluntarily winding up' when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section."

In this matter, however, the legislature, by section 54 of the Insurance Act, 1938, intervenes between the members of an insurance company and the rights which they otherwise would possess by virtue of the provisions of the Indian Companies Act. Section 54 of the Insurance Act, 1938, is in these terms:—

"Notwithstanding anything contained in the Indian Companies Act, 1913, an insurance company shall not be wound up voluntarily except for the purpose of effecting an amalgamation or a re-construction of the company, or on the ground that by reason of its liabilities it cannot continue its business."

From the terms of the foregoing section it will be seen that only one of the three grounds permitted by the Companies Act is available to an insurance company desirous of winding up its affairs voluntarily, while one new ground has been added, namely: that it purposes either to reconstruct itself or to effect an amalgamation with some other company.

(c) *Under the Court's supervision.* The Insurance Act, 1938, makes no direct reference to liquidation proceedings over which a Court casts a supervising eye. The relative sections of the Indian Companies Act are sections 221 to 226 read with such of the supplemental provisions from section 227 onwards as apply.

**What Companies may be wound up under the Act.**—Attention must now be directed to the wide words of section 53. Reference is here made to the words "the Court may order the winding up in accordance

with the Indian Companies Act, 1913, of any insurance company and the provisions of that Act shall, subject to the provisions of this Chapter, apply accordingly."

It is conceived that the words "any insurance company" are to be read as meaning "any insurance company incorporated under the Act referred to," that is to say which is incorporated in India; and that the statute does not presume to clothe the Court with power to order the winding up of an insurance company incorporated outside British India.<sup>1</sup> The student may be reminded that the only powers which the law relating to corporations in India assumes over foreign trading in this country are those set forth in Part X of the Companies Act.

**Primary and Secondary Companies.**—Where the insurance business or any part of the insurance business of a company has been transferred to another insurance company, the transferor in that Part of the Act which deals with winding up is styled "the secondary company" and the transferee is styled the "principal company".

Where a secondary company or any of its creditors has or have claims against the principal company, then, in any winding up of the affairs of the principal company by the Court or under its supervision, the secondary company shall also be wound up at the same time as the principal company. Manifestly, an order to wind up a secondary company would be unnecessary if the transfer shall have been complete, in the sense that no liability to the secondary company or to any one claiming under it is still outstanding. All that the relative section, which is section 57, intends to secure in the circumstances contemplated, is one set of proceedings for winding up instead of two. Consequently, the appropriate order enjoined by sub-section (1) is that the secondary company is to be wound up in conjunction with the principal company; for which reason the Court may appoint one and the same person as liquidator of the two companies, and may pass any other appropriate order in aid of the single proceedings contemplated.

Any creditor of, or any person interested in, either the principal or the secondary company may make an application in relation to their joint winding up.<sup>2</sup>

Where successive orders are passed for the winding up of two companies thus related, the winding up of the principal company shall be deemed to commence from the date of the commencement of the winding up of the secondary company.<sup>3</sup>

The statute contemplates, in another sub-section of section 57, a condition of things such that a company is in process of being wound up, while another company, which has occupied at some time the position of a transferor of the whole or part of its insurance business to the first-named company, is itself not in process of liquidation. The sub-section contemplates an allegation that the last-named company is, in fact, a secondary company within the meaning of section 57 (1) and that such an allegation is disputed. In such a case the Court must act in accordance with the provisions of section 57 (4), that is to say, it must not direct the alleged secondary company to be wound up unless, after hearing all

<sup>1</sup> A Court clothed with such power by virtue only of an Indian statute would of course have no means of enforcing such an order as is contemplated by sec. 53 (if read literally) upon a foreign company.

<sup>2</sup> Sec. 57 (5).

<sup>3</sup> Sec. 57 (2).

objections, if any, that may be urged by or on behalf of the alleged secondary company against its being wound up, it is of opinion that the allegation is warranted by the facts, and that to wind it up in conjunction with the liquidation of the principal company would be just and equitable.

The statute further contemplates two other sets of circumstances. It may be that a company stands in the relation of a principal company to one insurance company, and in that of a secondary company to some other insurance company; or one may find several insurance companies all of them secondary to one and the same principal company. In either of these imagined sets of circumstances the Court is empowered to deal with any number of such companies, either all together, or to split them up into separate groups for the purposes of liquidation: it being left to the discretion of the Court to decide upon the course deemed expedient in the particular circumstances found.<sup>1</sup>

By sub-section (3) of section 57 the statute provides one general direction to the Court touching the subject of adjusting the rights and liabilities of the members of whatever number of companies are being conjointly wound up as principal and secondary concerns. The relative sub-section is in these terms:—

“In adjusting the rights and liabilities of the members of the several companies among themselves the Court shall have regard to the constitution of the companies and to the arrangements entered into between the companies in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company or as near thereto as circumstances admit.”

The reader is referred to sections 156 to 161 of the Indian Companies Act, 1913, for the law relating to the rights and liabilities of contributories.

**Alternative to winding up of Life Insurance Company.**—In the case of an insurance company carrying on the business of life insurance which is liable to be wound up on the ground of insolvency, the Court is given a special and an extremely important discretion. It may, in lieu of making a winding up order, proceed to exercise its powers to reduce the amount of the insurance contracts, and may do so upon such terms and subject to such conditions as it thinks fit. For the purpose of any such reduction by the Court, the value of the assets and liabilities of the company, and all claims in respect of policies issued by it, shall be ascertained in such manner and upon such basis as the Court thinks proper having regard to the rule appearing in the Sixth Schedule.<sup>2</sup>

**Reduction of contracts.**—In course of liquidation or insolvency proceedings the Court is empowered to make an order reducing the amount of the insurance contracts of a company or of any other insurer upon such terms and subject to such conditions as it may think just.<sup>3</sup>

**Who may apply.**—The power of the Court to reduce contracts of insurance, either in lieu of winding up or in the course of proceedings to wind up, may be invoked by the liquidator or by the company or by some one or more persons purporting to apply on the company's behalf,

<sup>1</sup> Sec. 57 (6).

<sup>2</sup> Sec. 56 (2) set out at pp. 565 and *lxxxix*, *post*.

<sup>3</sup> Sec. 61 (1).

or by a policy-holder, or by the Superintendent of Insurance. On any such application the Superintendent is entitled to be heard. So, too, may be heard any other person whom the Court considers likely to be affected by the order applied for.

**Affairs of insurers other than companies.**—The provisions as to valuation of assets and liabilities and the directions as to surplus assets mentioned hereafter will guide those who are concerned with the duty of winding up the affairs of insurers other than companies. In other respects such insurers will have their affairs dealt with under the appropriate insolvency statute according as to whether their principal place of business in India is in a presidency town or elsewhere.

**Valuation of assets and liabilities.**—The provisions of the Insurance Act, 1938, regarding the valuation of assets and liabilities in liquidation proceedings need to be considered under two heads, namely, life insurance, and insurance business other than life.

(a) *Life insurance business.* For the guidance of liquidators and receivers, assisted in every case by an actuary to be approved by the Court, the statute in its Sixth Schedule lays down a rule of general application to life insurance concerns. The relative passage in the said Schedule is thus worded:—

“The liabilities of an insurer in respect of current contracts effected in the course of life insurance business including annuity business, shall be calculated by the method and upon the basis to be determined by an actuary approved by the Court, and the actuary so approved shall, in determining as aforesaid, take into account—

- (a) the purpose for which such valuation is to be made,
- (b) the rate of interest and the rates of mortality and sickness to be used in valuation, and
- (c) any special directions which may be given by the Court.”

(b) *Business other than life insurance.* As to business other than life insurance the Sixth Schedule provides that “the liabilities of such an insurer in respect of current policies shall be such portion of the last premium paid as is proportionate to the unexpired portion of the policy in respect of which the premium was paid”.

Whether the valuation has to be made of the assets and liabilities of an insurer coming under the head of (a) or under that of (b) above, the provisions of section 55 (1), which attract the terms of the rule appearing in the Sixth Schedule, direct that the value of the assets and liabilities of an insurer in liquidation or insolvency proceedings, as the case may be, “shall be ascertained in such manner and upon such basis as the liquidator or receiver in insolvency thinks fit, subject, so far as applicable, to the rule contained in the Sixth Schedule and to any direction given by the Court”.

Touching the rule in the Sixth Schedule, the statute provides that it shall have the same force and may be repealed, altered, or amended, as if it were a rule made in pursuance of section 246 of the Indian Companies Act,<sup>1</sup> and that rules may be made under section 246 of that Act for the purpose of carrying into effect the provisions of the Insurance Act, with respect to the winding up of insurance companies.

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<sup>1</sup> Sec. 55 (3).

**Separate valuation for Life Insurance.**—Where the affairs of an insurer, whether a company, a partnership or an individual proprietor, are being wound up by proceedings in liquidation or in insolvency, as the case may be, and such insurer has been carrying on business in more than one class of insurance, including life, the value of the assets and liabilities of any such insurer in respect of his life insurance business is to be ascertained separately from the value of any other assets and liabilities. All assets properly belonging to the life insurance business must first be applied towards liquidating the liabilities in respect of that business. Where the value of such assets, properly ascertained, is found to exceed the value of the liabilities of the insurance business, the surplus may be applied towards extinguishing the general liabilities of the concern.<sup>1</sup>

**Procedure as to *prima facie* surplus.**—The Act condescends to somewhat elaborate directions (ancillary to those already commented upon above) in respect of insurers carrying on life-insurance business.

For the purpose of these additional directions the statute contemplates three separate circumstances:—

(i) where, before the commencement of the winding up or insolvency, as the case may be, there has been a general allocation of certain proportions of the profits to shareholders and policy-holders<sup>2</sup>,

(ii) where such allocation has taken place in connection with some branch or branches only of the concern; and

(iii) where there has been no such allocation at all.

The directions vary with the above circumstances. Taking them in the same order as above, we find that:—

(i) If, after the determination of the assets and liabilities, there is found a surplus of assets, this is styled the *prima facie* surplus only. It is then necessary to see if there has been an allocation of any proportion of the profits to shareholders and policy-holders during a period of ten years preceding the commencement of the winding up or insolvency, as the case may be. It then becomes the duty of the liquidator, with the assistance of the actuary, to take the figure of such allocation (if found) and to add that figure to the previously ascertained figure representing the valuation of liabilities. Having made this addition, the total valuations will be amended accordingly; and only if the figure for the assets be then found to exceed that of the valued liabilities, will the assets of the insurer be deemed to exceed his liabilities. In other words a *prima facie* surplus will, after the new calculation, give place to a *real* surplus for the purposes of the Act.

(ii) In this case the value of the assets and liabilities of the branch must be separately ascertained, and any surplus found in the ordinary way will be treated as the *prima facie* surplus. The relative clause<sup>3</sup> is far from being clearly worded, but it would seem that for the purpose of determining the *real* surplus for the business as a whole, the proportion of profits allocated during the previous ten years will be added to the figure of the liabilities in the same way as is described under (i) above.

(iii) This presupposes the case of no prior allocation. Here again the relative clause is far from clear.<sup>4</sup> But it appears that in such a case, or if by reason of any special circumstances, it would be inequitable

<sup>1</sup> Sec. 56 (1).

<sup>2</sup> Sec. 56 (2).

<sup>3</sup> Sec. 56 (2) (b).

<sup>4</sup> Sec. 56 (2) (c).

to add to the liabilities of the insurer, the Court has a discretion to decide what figure, if any, shall be added to the previously ascertained liabilities.

**Partial winding up.**—The Act contemplates a state of affairs when the members, or those in charge, of an insurance company consider it expedient that its affairs in respect of a certain class or classes of business comprised in the undertaking should be wound up, but that the rest of its insurance business should continue: either to be carried on by the company, or to be transferred to some other insurer. A scheme to effect such purposes may be prepared, but cannot be acted upon without submission to, and confirmation by the Court, in accordance with the relative provisions of the statute.<sup>1</sup>

Any scheme so prepared for submission to the Court must provide—

- (1) for the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets which may arise on the proposed winding up);
- (2) for the future rights of every class of policy-holder in respect of their policies, and for the manner of winding up any of the affairs of the company which are proposed to be wound up under the scheme; and
- (3) may contain proposals for altering the memorandum of the company with respect to its objects; and
- (4) may make such further provisions as may be expedient for giving effect to the scheme.<sup>2</sup>

All the foregoing provisions relating to the valuation of assets and liabilities of insurers in liquidation or insolvency, as also those which relate to the application of surplus assets of the Life Insurance Fund, in liquidation or insolvency, shall apply to the winding up of any part of the affairs of a company in accordance with a scheme under this section.<sup>3</sup>

Any order of the Court confirming a scheme under this section and involving alteration of a company's memorandum with respect to its object shall have effect as if it were an order confirmed under section 12 of the Indian Companies Act, 1913, and the provisions of sections 15 and 16 of that Act shall apply accordingly.<sup>4</sup>

Reference to the first of the two sections last mentioned will indicate that a certified copy of an order so confirming an alteration of the Memorandum must, within three months of the relative date, be filed with the Registrar, who shall certify the registration. Thenceforward the altered memorandum becomes the memorandum of the company.

Section 16 deals with the effect of failure to register a confirmatory order within the proper time.

**Return of deposits.**—The winding up of an insurance company, or proceedings in insolvency in the case of any other insurer, entitles the liquidator or assignee, as the case may be, to apply to the Court for an order directing the return of the Compulsory Deposit. Upon any such application the Court will make the order subject to such terms and conditions as appear in the circumstances to be proper.

**Notice of, and right to dispute, valuation.**—In every proceeding to wind up the affairs of an insurer the liquidator or assignee, as the case may be, shall ascertain the value of the liability to every person

<sup>1</sup> Sec. 58 (1).

<sup>2</sup> Sec. 58 (2).

<sup>3</sup> Sec. 58 (3).

<sup>4</sup> Sec. 58 (4).

entitled to or interested in the relative policies outstanding, and shall give notice of such value to all those persons in such manner as the Court may direct. Any person to whom notice is so given, unless he himself gives notice of his intention to dispute the alleged value in such manner and within such time as may be specified by a rule or order of the Court, will become bound by the value so ascertained and so notified to him.<sup>1</sup>

## 6. *Dissolution of Provident Societies*

The Act contemplates the final dissolution of a Provident Society by an executive act of the Superintendent of Insurance. Prior to such act the statute requires that the affairs of the society shall be wound up, either under the Indian Companies Act, where applicable, or under the provisions of Part III of the Insurance Act. As in the case of insurers of the classes elsewhere dealt with in the present chapter, so in the case of Provident Societies, the statute provides an alternative remedy to winding up, with a view to meeting the society's difficulties without being forced to dissolve it. Reference is here made to the permission which the statute accords to a properly designed scheme for the reduction of the society's contracts. To this alternative method of meeting a society's difficulties more detailed reference will be made below.

**Winding up.**—Section 88 (1) and (3) of the Act provides for the winding up of a society which has been incorporated as a company under the Indian Companies Act. It may be either wound up by the Court or voluntarily. In either case, and subject always to the provisions of Part III of the Insurance Act, the ordinary method of winding up of a company under the first-mentioned statute applies.

Unlike the provisions of the Insurance Act relating to insurance companies other than Provident Societies, all the grounds upon which a Court may be moved for an order winding up a company by the Court, which figure in section 162 of the Indian Companies Act, are available to those entitled to move for such an order in the case of a Provident Society. There is however an additional ground for such an order provided by section 88 (2) of the Insurance Act, that is, where the registration of the society has been cancelled under the provisions of section 70 (4)—a condition of things which has already been dealt with at page 509 of this treatise.

As in the case of other insurance companies, so in that of a Provident Society incorporated under the Indian Companies Act, a voluntary liquidation is permissible. But the grounds for any such voluntary liquidation are by the provisions of sub-section (3) of section 88 strictly limited to three, namely, either for the purpose of effecting an amalgamation, or for that of reconstructing the society, or on the ground that by reason of its liabilities the society cannot continue its business.

A Provident Society which has not been incorporated under the Indian Companies Act, stands in a slightly different position.<sup>2</sup> It seems that it can only be wound up either voluntarily (as to which see below) or by the Superintendent of Insurance: who, however, is by the statute only able to pass such an order in a case where the society is so placed at the moment that he may properly cancel its registration under sub-section (4) of section 70.

<sup>1</sup> Sec. 60.

<sup>2</sup> See sec. 88 (4).

Inasmuch, however, as such an order of cancellation is of no effect without the sanction of the Court, for all practical purposes it is the Court which decrees cancellation and which thus leads to the winding up of the society's affairs. The difference between orders in the nature of cancellation thus bringing about a liquidation of a society not incorporated under the Indian Companies Act, and a corresponding order affecting a society registered under the last-mentioned statute, is that in the latter case the proceedings for winding up will be in the main governed by the Companies Act, while in the former instance they will not be.

By the terms of sub-section (4) of section 88 a Provident Society unincorporated under the Companies Act may be wound up voluntarily if a resolution be passed to that intent by its proprietors. The grounds upon which such proprietors may so act are identical with those permitted to a society which is a registered company; that is to say, they are limited to the purpose of effecting an amalgamation or reconstruction or that by reason of its liabilities the society cannot continue its business.

**The alternative to winding up.**—Whether in the case of a contemplated cancellation under section 70 (4) or, if at any stage in liquidation proceedings the Court thinks fit, and whether such proceedings be under the Companies Act or otherwise, power is given (in the first instance) to the Superintendent to recommend, and in every case to the Court to apply, if thought fit, a less drastic method than cancellation or dissolution, by ordering reduction in the amount of the insurance contracts. The order is made upon such terms and subject to such conditions as the Court thinks just.<sup>1</sup>

The terms of the relevant section enable an application to the Court for the purposes of reducing the contractual liabilities of a society to be made (where the order to be applied for is in lieu of cancellation) by the Superintendent himself; in other cases, by some one or more persons on behalf of the society. In the latter instance the application must be supported by a special Actuarial Report.

In every case in which an application is made for this alternative remedy, the intention of the statute is to give the policy-holders an opportunity of being heard before the Court disposes of the matter.

**Appointment of liquidator.**—Within seven days of an order of the Court ordering the winding up of a Provident Society, and within a like period counted from the date of the requisite resolution authorising a voluntary winding up, the society must give notice to the Superintendent of the relative order or resolution, as the case may be. Where the winding up is by the Court, it is the Court which appoints the liquidator. In all other cases the duty of appointing the liquidator is, by the statute, imposed upon the Superintendent, as is also that of determining the amount of the remuneration to be paid to the liquidator whom the Superintendent has so appointed.<sup>2</sup>

A liquidator who has been appointed by the Superintendent may be removed by the latter in any case where the Superintendent is satisfied that the duties entrusted to the liquidator are not being properly discharged.<sup>3</sup>

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<sup>1</sup> See proviso to sec. 70 (4) and the terms of sec. 89.

<sup>2</sup> Sec. 90 (1).

<sup>3</sup> Sec. 90 (2).

**Powers of liquidator.**—A liquidator, whether appointed by the Court or appointed by the Superintendent of Insurance, has, by the terms of section 91 (1), the following powers conferred upon him:—

- (a) to institute or defend any legal proceedings on behalf of the society by his name or office;
- (b) to determine the contribution to be made by members of the society respectively to the assets of the society;
- (c) to investigate all claims against the society and to decide questions of priority arising between claimants;
- (d) to determine by what persons and in what proportions the costs of the liquidation are to be borne;
- (e) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society;
- (f) to summon, and enforce the attendance of, witnesses, and to compel the production of documents, by the same means and as far as may be in the same manner as is provided in the case of a civil court by the Code of Civil Procedure, 1908; and
- (g) with the sanction of the Superintendent of Insurance, to employ such establishment and to obtain such assistance from an actuary or an auditor as may be necessary for the discharge of his duties.

For the purpose of enabling the liquidator to settle the list of contributories, and to realise their contributions, the statute confers upon him the same powers as are enjoyed by an official liquidator appointed by the Court for the winding up of a company under the Companies Act.<sup>1</sup> The powers thus attracted are to be found in section 179 of the last-mentioned statute.

The liquidator is directed to make a valuation of the society's assets and an estimate of the costs of winding up its affairs, and it is upon the basis of this valuation and this estimate that he is directed to settle the list of contributories.<sup>2</sup>

**Books.**—The liquidator is directed to keep books of accounts in which he shall record all amounts received or expended by him and any other matter that may be prescribed. The sub-section also directs him to maintain a record of the proceedings of all meetings attended by him. In spite of the language of the sub-section<sup>3</sup> it is conceived that in practice the liquidator will not keep his record of proceedings in his account books, but will record them separately under more appropriate conditions. The sanction of the Superintendent is necessary before the liquidator's records can be inspected by a creditor or a contributory. It is otherwise where there has been a committee of inspection appointed. For the members of any such committee have an express right to inspect at any rate the liquidator's accounts at all reasonable times.<sup>4</sup>

**Taking charge.**—The liquidator is directed immediately upon his appointment to take charge of the whole of the society's property including all its books and documents.<sup>5</sup>

**Ascertainment of liabilities.**—As soon as practicable after taking charge as aforesaid, and with such assistance from an actuary as

<sup>1</sup> Sec. 91 (2).

<sup>4</sup> Sec. 92 (5).

<sup>2</sup> Sec. 92 (7).

<sup>5</sup> Sec. 92 (1).

<sup>3</sup> Sec. 92 (10).

may be required, the liquidator must ascertain the amount of the society's liability to every person who (according to its books) appears to be entitled to or interested in any policy which it has issued.

**Notice.**—Upon ascertaining a liability as above-mentioned the liquidator is required to give notice<sup>1</sup> in the prescribed<sup>2</sup> manner of the amount so found to the person entitled to or interested in the relative policy.

**Persons interested to be bound by notice.**—By the express terms of section 92 (6) every person entitled to or interested in a policy issued by a Provident Society in liquidation, who receives the liquidator's statutory notice of the amount which the liquidator finds represents the society's liability to such person, is to be bound by the value so ascertained. It is noticeable that, unlike persons correspondingly interested in policies issued by insurance undertakings other than Provident Societies, no opportunity is given to a policy-holder or other interested person of disputing the valuation so notified.<sup>3</sup>

**Statutory Meetings.**—Within 15 days of his appointment the liquidator is required<sup>4</sup> to summon a meeting of the society's creditors. This he must do by a Notice wherein will be stated the place, date, and hour at which the meeting will be held. Some restriction is placed upon the liquidator in the matter of the date for which he may call such a meeting. It is provided that the date must not be less than 21, or more than 28, days after the liquidator's appointment. The notice itself must be sent by post to all persons who appear to the liquidator to be creditors of the society. A copy of the same notice must also be advertised once in the local official gazette and at least once in two newspapers circulating in the Province in which the society's registered office is situated.

At the said statutory meeting of creditors the latter have the express right to determine whether they will accept the liquidator who is already functioning, or whether an application shall be made for the appointment of some one else, or whether an application shall be made for another liquidator to act conjointly with him who is already functioning in that capacity. The same meeting may, if it think fit, decide to apply for the appointment of a committee of inspection.<sup>5</sup> Such a meeting, by appropriate resolution, may also give directions to the liquidator touching the administration or distribution of the assets.

**To whom applications are made.**—The applications which a meeting of creditors may decide upon for the purpose mentioned above have to be made to the Superintendent of Insurance. Such an application can only be made by a creditor expressly appointed in that behalf at the meeting itself. It can be entertained by the Superintendent only if made within 14 days from the date on which the meeting of creditors was held.

<sup>1</sup> Sec. 92 (6).

<sup>2</sup> This is apparently intended to be dealt with by the statutory rules under the section and sub-section already mentioned. It is thought a mere slip of draftsmanship that, in fact, no provision in the Insurance Rules is to be found.

<sup>3</sup> Compare pp. 567 and 568, *ante*.

<sup>4</sup> Sec. 92 (3).

<sup>5</sup> Sec. 92 (4).

**Disposal of application.**—On a proper application being made, in time, for any of the purposes mentioned above, the Superintendent is bound to appoint a committee of inspection if so moved. On the other hand, to him apparently is entrusted the duty of choosing the personnel of any such committee. So, too, is he permitted to choose a suitable person to act in place of, or jointly with, the liquidator already appointed. But, apparently, he has no discretion to refuse any application properly made under section 92 (4) if the same be in time.<sup>1</sup>

**Subsequent statutory meeting.**—Where the liquidation of a *Provident Society* continues for more than a year, the liquidator is obliged under section 92 (11) of the statute to summon a meeting of all creditors and contributories at the end of the first and of every succeeding year, until the affairs of the society shall have been completely wound up. At every such statutory meeting summoned under the provisions of the said sub-section the liquidator must lay before it a full account of his acts and dealings and of his conduct of the liquidation proceedings during the relative period. The sub-section goes on to direct that every such account so rendered to such a meeting, as also any views which the meeting itself may have chosen to express thereon, shall be forwarded by the liquidator to the Superintendent of Insurance.

**Committee of inspection.**—A committee of inspection, properly appointed under section 92 (4) of the statute, is by sub-section (5) given a general power of supervision over the acts of the liquidator. Such general powers, however, may be made subject to any conditions prescribed in that behalf by a statutory rule or rules made under section 114 (2).

**Return of compulsory deposit.**—By sub-section (8) of section 92 the liquidator is required to apply to the Superintendent for an order directing the return to the society (through the liquidator) of the compulsory deposit. On being so moved the Superintendent must make the order required of him, but may do so subject to such terms and conditions as he may think fit.

**Administration and distribution of assets.**—In administering and distributing the assets, the liquidator is enjoined to have regard to any directions that may be given by the creditors or contributories at a general meeting or to any directions in the same behalf which may be given him by the Superintendent.<sup>2</sup>

**Liquidator may be guided by Companies Act.**—By the terms of section 92 (12) of the statute the liquidator is directed that in any matter of procedure not expressly covered by the provisions of the Insurance Act, or by any statutory rule made under that Act, he should be guided by and should follow, as far as is practicable, the procedure laid down in the Indian Companies Act, 1913, for an official liquidator appointed by the Court for winding up a company under the last-mentioned statute.

**Penal sanctions.**—Section 92 (9) of the Insurance Act provides that if any proprietor or officer of a *Provident Society*, or any other person, retains any portion of the assets of such a society, or fails to deliver to

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<sup>1</sup> See sec. 92 (4), i.e., to implement the resolutions.

<sup>2</sup> Sec. 92 (9).

the liquidator thereof any book or document which he has been required by the liquidator to hand over, the person so in default may be punished with imprisonment which may extend to six months or with a fine which may extend to Rs. 500 or with both; and the Court in applying the sanction created by this sub-section may order the delivery of the retained asset or book or document, as the case may be, to be made to the liquidator.

**Proceedings after winding up.**—So soon as the affairs of a Provident Society are or appear to be fully wound up, the liquidator must prepare an account of the liquidation showing how the same has been conducted, and how the relative property has been disposed of. He must then call a meeting of the members, creditors and contributories; and, having done so, must lay before it his account as aforesaid, and must be prepared to render to the meeting any explanation required of him in that regard.<sup>1</sup>

**Final statutory meeting.**—A final statutory meeting is contemplated by section 93 (1) the Notice of which must, in accordance with sub-section (2), be sent to each person individually. It must also be advertised in the local official gazette and in at least two newspapers circulating in the Province in which the society is situated, i.e., in which is situated its registered office.

**Proceedings after final statutory meeting.**—By section 93 (3) the liquidator is required to send to the Superintendent a copy of the proceedings of the final statutory meeting held under section 93 (1) together with a copy of the account which he (the liquidator) rendered to that meeting. All this he must do within seven days from the date on which the said statutory meeting shall have been held.

Upon receipt of the aforesaid documents from the liquidator, the Superintendent is required to scrutinise the liquidator's account as rendered to the said statutory meeting. Should he find the account to be incomplete, or in any way unsatisfactory, the Superintendent has a discretion to require the liquidator to take such further steps as the Superintendent deems necessary for the purpose of fully and properly completing the liquidation of the society. The liquidator must comply with any such requirement, and, in that case, is given a further six months within which to furnish the Superintendent with an additional report.<sup>2</sup>

**Declaration of dissolution, and discharge of liquidator.**—If, however, the Superintendent, on studying the liquidator's account and the proceedings of the final statutory meeting, is satisfied that the society's affairs have been fully wound up, he shall register the liquidator's account. The liquidator must then make over to the Superintendent any sum of money remaining undistributed or otherwise undisposed of.<sup>3</sup> The statute prescribes a period of three months after the registration of the liquidator's account before the Superintendent may carry out the final executive act enjoined upon him by the statute, namely, to make his official declaration dissolving the society. Such a declaration dissolving a Provident Society must be notified in the local official gazette. Upon such a notification appearing, the liquidator becomes *ipso facto* discharged from further responsibility.<sup>3</sup>

<sup>1</sup> Sec. 93 (1).

<sup>2</sup> Sec. 93 (4).

<sup>3</sup> Sec. 93 (5).

**Unclaimed monies.**—If within a period of five years from the date on which any sums may have been made over to the Superintendent under sub-section (5) of section 93 an order of a Court of competent jurisdiction has not been obtained at the instance of any claimant to such sums for their disposal, the said sums shall become the property of Government.<sup>1</sup>

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<sup>1</sup> Sec. 93 (6).

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# APPENDIX I

## THE INSURANCE ACT (IV OF 1938)

(As amended by Acts Nos. XI and XLI of 1939)

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## APPENDIX I

### THE INSURANCE ACT (IV OF 1938)

(As amended by Acts XI and XLI of 1939)

(Received the assent of the Governor-General on 26th February, 1938.)<sup>1</sup>

Whereas it is expedient to consolidate and amend the law relating to the business of insurance ; It is hereby enacted as follows :—

#### PART I.

##### PRELIMINARY.

**1. Short title, extent and commencement.**—(1) This Act may be called the Insurance Act, 1938.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

- (1) “actuary” means an actuary possessing such qualifications as may be prescribed ;
- (2) “policy-holder” includes the person who is the absolute assignee of the benefits under the policy ;
- (3) “approved securities” means Government securities, and any other security charged on the revenues of the Central Government or of a Provincial Government, or guaranteed fully as regards principal and interest by the Secretary of State in Council or the Secretary of State or the Central Government or a Provincial Government ; and any debenture or other security for money issued under the authority of any Act of a Legislature established in British India by or on behalf of a port trust or municipal corporation or city improvement trust in any Presidency-town, or by or on behalf of the trustees of the port of Karachi ;
- (4) “auditor” means a person qualified under the provisions of section 144 of the Indian Companies Act, 1913, to act as an auditor of companies ;
- (5) “certified” in relation to any copy or translation of a document required to be furnished by or on behalf of an insurer means certified by a principal officer of the insurer to be a true copy or a correct translation, as the case may be ;
- (6) “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction ;

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<sup>1</sup> Promulgated by Notification in Gazette of India, Part IV, 5th March, 1938.

- (7) "Government securities" means Government securities as defined in the Indian Securities Act, 1920 ;
- (8) "insurance company" means any insurer being a company, association or partnership which may be wound up under the Indian Companies Act, 1913, or to which the Indian Partnership Act, 1932, applies ;
- (9) "insurer" means—
- (a) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country other than British India, carrying on insurance business [not being a person specified in sub-clause (c) of this clause] which—
    - (i) carries on that business in British India, or
    - (ii) has his or its principal place of business or is domiciled in British India, or
    - (iii) with the object of obtaining insurance business, employs a representative, or maintains a place of business, in British India,
  - (b) any body corporate [not being a person specified in sub-clause (c) of this clause] carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in British India ; or stands to any such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 1913, as defined by sub-section (2) of section 2 of that Act, and
  - (c) any person who in British India has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorised within the terms of such contract to issue protection notes, cover notes, or other documents granting insurance cover to others on behalf of the underwriters,
- but does not include an insurance agent licensed under section 42 or a provident society to which the provisions of Part III apply ;
- (10) "insurance agent" means an insurance agent licensed under section 42 being an individual who receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business ;
- (11) "life insurance business" includes annuity business, that is to say, the business of effecting contracts of insurance for the granting of annuities on human life and, if so provided in the contract of insurance, disability and double or triple indemnity accident benefits ;
- (12) "manager" and "officer" have the meanings assigned to those expressions in clauses (9) and (11) respectively of section 2 of the Indian Companies Act, 1913 ;
- (13) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement,

and includes any person, firm or company occupying such position by whatever name called.

*Explanation.*—If a person occupying the position of managing agent calls himself manager or managing director, he shall nevertheless be regarded as managing agent for the purposes of section 32 of this Act ;

- (14) “prescribed” means prescribed by rules made under section 114 ; and
- (15) “Superintendent of Insurance” means the officer, who shall be a qualified actuary, appointed by the Central Government to perform the duties of the Superintendent of Insurance under this Act.

## PART II.

### PROVISIONS APPLICABLE TO INSURERS.

**2A. Insurers to be subject to this Act while liabilities remain unsatisfied.**—Every insurer shall be subject to all the provisions of this Act in relation to any class of insurance business so long as his liabilities in British India in respect of business of that class remain unsatisfied or not otherwise provided for.

**2B. This Act not to apply to certain insurers ceasing to enter into new contracts before commencement of Act.**—The provisions of this Act shall not apply to an insurer as defined in paragraph (i) or (ii) of sub-clause (a) of clause (9) of section 2 in relation to any class of his insurance business where such insurer has ceased, before the commencement of this Act, to enter into any new contracts of that class of business.

**3. Registration.**—(1) No insurer shall, after the commencement of this Act, begin to carry on any class of insurance business in British India, and no insurer carrying on any class of insurance business in British India shall, after the expiry of three months from the commencement of this Act, continue to carry on any such business, unless he has obtained from the Superintendent of Insurance a certificate of registration.

(2) Every application for registration shall be accompanied by—

- (a) a certified copy of the memorandum and articles of association, where the applicant is a company and incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby or, in the case of any other insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2, a certified copy of the deed of partnership or of the deed of constitution of the company, as the case may be, or, in the case of an insurer having his principal place of business or domicile outside British India, the document specified in clause (a) of section 63 ;
- (b) the name, address and the occupation, if any, of the directors where the insurer is a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby and in the case of an insurer specified in sub-clause (a) (ii) of clause (9) of section 2 the names and addresses of the proprietors and of the

manager in British India, and in any other case the full address of the principal office of the insurer in British India, and the names of the directors and the manager at such office and the name and address of some one or more persons resident in British India authorised to accept any notice required to be served on the insurer ;

- (c) a statement of the class or classes of insurance business done or to be done, and a statement that the amount required to be deposited by section 7 or section 98 before application for registration is made has been deposited together with a certificate from the Reserve Bank of India showing the amount deposited ;
- (d) where the provisions of section 6 or section 97 apply, a declaration verified by an affidavit made by the principal officer of the insurer authorised in that behalf that the provisions of those sections as to working capital have been complied with ;
- (e) in the case of an insurer having his principal place of business or domicile outside British India, a statement verified by an affidavit made by the principal officer of the insurer setting forth the requirements (if any) not applicable to nationals of the country in which such insurer is constituted, incorporated or domiciled which are imposed by the laws or practice of that country upon Indian nationals as a condition of carrying on insurance business in that country ;
- (f) a certified copy of a published prospectus, if any, and of the standard policy forms of the insurer, and statements of the assured rates, advantages, terms and conditions to be offered in connection with insurance policies, together with a certificate in connection with life insurance business by an actuary that such rates, advantages, terms and conditions are workable and sound :

Provided that in the case of marine, accident and miscellaneous insurance business other than workmen's compensation and motor car insurance, the above requirements regarding prospectus, forms and statements shall be complied with only in so far as prospectus, forms and statements may be available ; and

- (g) the prescribed fee for registration being not more than one hundred rupees for each class of business.

(3) In the case of any insurer having his principal place of business or domicile outside British India, the Superintendent of Insurance shall withhold registration or shall cancel a registration already made, if he is satisfied that in the country in which such insurer has his principal place of business or domicile Indian nationals are debarred by the law or practice of the country relating to, or applied to, insurance from carrying on the business of insurance, or that any requirement imposed on such insurer under the provisions of section 62 is not satisfied.

(4) In the case of any insurer the Superintendent of Insurance shall cancel a registration already made if the insurer fails to comply with the provisions of section 7 or section 98 as to deposits.

(5) When the Superintendent of Insurance withholds or cancels any registration under sub-section (3) or sub-section (4) he shall give notice in writing to the insurer of his decision, and the decision shall take effect on such date as he may specify in that behalf in the notice, such date not being less than one month nor more than two months from the date of the receipt of the notice in the ordinary course of transmission.

(6) The Superintendent of Insurance shall, on being satisfied that the applicant has fulfilled all the requirements of the Act applicable to him, grant the insurer a certificate of registration.

**4. Minimum limits for annuities and other benefits secured by policies of life insurance.**—(1) No insurer, not being a provident society to which Part III, or a Co-operative Life Insurance Society or a Mutual Insurance Company to which Part IV of this Act applies, shall pay or undertake to pay on any policy of life insurance issued after the commencement of this Act an annuity of fifty rupees or less or a gross sum of rupees five hundred or less exclusive of any profit or bonus provided that this shall not prevent an insurer from converting any policy into a paid up policy of any value or payment of surrender value of any amount.

(2) Nothing contained in this section shall apply to group policies, that is to say, policies in respect of a group of persons engaged in the same occupation or kindred occupations under a single employer, for an aggregate sum of not less than rupees five thousand, under which an insurer pays or undertakes to pay a gross sum of rupees five hundred or less on an individual life.

**5. Restriction on name of insurer.**—(1) An insurer shall not be registered by a name identical with that by which an insurer in existence is already registered, or so nearly resembling that name as to be calculated to deceive except when the insurer in existence is in the course of being dissolved and signifies his consent to the Superintendent of Insurance.

(2) If an insurer, through inadvertence or otherwise, is without such consent as aforesaid registered by a name identical with that by which an insurer already in existence whether previously registered or not is carrying on business or so nearly resembling it as to be calculated to deceive, the first-mentioned insurer shall, if called upon to do so by the Superintendent of Insurance on the application of the second-mentioned insurer, change his name within a time to be fixed by the Superintendent of Insurance :

Provided that nothing in this section shall apply to any insurer carrying on business before the 27th day of January, 1937, under the Indian Life Assurance Companies Act, 1912.

(3) No insurer other than a provident society to which Part III applies, who begins to carry on insurance business after the commencement of this Act, shall adopt as its name and no such insurer carrying on business before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name any combination of words which includes the word " provident ".

**6. Requirements as to capital.**—No insurer incorporated after, or who commenced carrying on the business of life insurance in British India, whether solely or in common with any other business, after the 26th day of January, 1937, shall be registered unless he has as working capital a net sum of not less than fifty thousand rupees exclusive of the deposit to be made before registration under sub-section (5) of section 7

of this Act, and exclusive in the case of a company of any sums payable as preliminary expenses in the formation of the company.

**7. Deposits.**—(1) Every insurer not being an insurer specified in sub-clause (c) of clause (9) of section 2 shall, in respect of the insurance business carried on by him in British India, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government cash or approved securities, estimated at the market value of the securities on the day of deposit, of the amount hereafter specified, namely :—

- (a) where the business done or to be done is life insurance only, two hundred thousand rupees ;
- (b) where the business done or to be done is fire insurance only, one hundred and fifty thousand rupees ;
- (c) where the business done or to be done is marine insurance only, one hundred and fifty thousand rupees ;
- (d) where the business done or to be done is accident and miscellaneous insurance including workmen's compensation, and motor car insurance, one hundred and fifty thousand rupees ;
- (e) where the business done or to be done includes life insurance and any one of the three classes specified in clauses (b), (c) and (d), three hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business ;
- (f) where the business done or to be done includes life insurance and any two of the three classes specified in clauses (b), (c) and (d), four hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business ;
- (g) where the business done or to be done includes life insurance and all three classes specified in clauses (b), (c) and (d), four hundred and fifty thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business ;
- (h) where the business done or to be done does not include life insurance but includes any two of the classes specified in clauses (b), (c) and (d), two hundred and fifty thousand rupees ;
- (i) where the business done or to be done does not include life insurance but includes all three classes specified in clauses (b), (c) and (d), three hundred and fifty thousand rupees ; and
- (j) where the business done or to be done is marine insurance relating to country craft or its cargo and no other type of marine insurance, ten thousand rupees only.

(2) Where the insurer is an insurer specified in sub-clause (c) of clause (9) of section 2, he shall be deemed to have complied with the provisions of this section as to deposits, if in respect of any class of insurance business carried on by him in British India under a standing contract of the nature referred to in sub-clause (c) of clause (9) of section 2 a deposit of an amount one-and-a-half times that specified in sub-section (1) as the deposit for that class of insurance business has been made in the Reserve Bank of India in one of the offices in India of

the Bank for and on behalf of the Central Government in cash or approved securities estimated at the market value of the securities on the day of deposit by or on behalf of the underwriters who are members of the Society of Lloyd's with whom he has his standing contract.

(3) Where the deposit is to be made by an insurer incorporated before, or carrying on the business of insurance in British India before, the 27th day of January, 1937, the deposit referred to in sub-section (1) may be made in not more than seven instalments, of which the first shall be not less than one-fourth of the total amount of the deposit and shall be paid before the application for registration is made, the second shall be not less than one-sixth of the balance of the deposit and shall be paid before the expiry of four months from the commencement of this Act, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment and shall be paid before the 1st day of January of each succeeding year.

Provided that in the case of insurers carrying on life insurance business only, the deposit may be made in not more than ten instalments, of which the first shall be not less than one-fourth of the total amount of the deposit, and shall be paid before the application for registration is made, the second shall be not less than one-ninth of the balance of the deposit, and shall be paid before the expiry of four months from the commencement of this Act, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment, and shall be paid before the 1st day of January of each succeeding year.

(4) Notwithstanding anything contained in sub-section (3), in the case of an insurer to whom that sub-section applies not being an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit referred to in sub-section (1) shall be made in two instalments of which the first shall be not less than one-half of the total amount of the deposit and shall be made before the application for registration is made, and the second shall be made before the expiry of one year from the date of registration.

(5) Where the deposit is to be made by an insurer neither incorporated before, nor carrying on insurance business in British India before, the 27th day of January, 1937, the deposit may be made in instalments of not less than one-fourth the total amount before the application for registration is made, not less than one-third the balance before the expiry of one year from the commencement of business in British India, and not less than one-half the residue before the expiry of two years from the commencement of business in British India, and the balance before the expiry of three years from the commencement of business in British India :

Provided that in the case of any insurer not being an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit shall be made in full before the application for registration is made.

(6) No class of insurance business in addition to the class or classes in respect of which an insurer is already liable to make a deposit under sub-section (1) or sub-section (2) shall be undertaken by the insurer until the deposit to which he is already liable has been made in full, and the additional deposit required in respect of the additional class of business

or so much thereof as under the provisions of sub-section (3), (4) or (5) is to be made before the application for registration, has also been made in full.

(7) Securities already deposited with the Controller of Currency in compliance with the Indian Life Assurance Companies Act, 1912, shall be transferred by him to the Reserve Bank of India and shall, to the extent of their market value on the day of the first deposit made in compliance with this Act, be deemed to be deposited under this Act in respect of the life insurance business of the insurer.

(8) A deposit made in cash shall be held by the Reserve Bank of India to the credit of the insurer and shall be returnable to the insurer in cash in any case in which under the provisions of this Act a deposit is to be returned; and any interest accruing due and collected on securities deposited under sub-section (1) or sub-section (2) shall be paid to the insurer, subject only to deduction of the normal commission chargeable for the realisation of interest.

(9) The insurer may at any time substitute for securities lodged with the Bank under this section other approved securities of equal value at the market rate prevailing at the time of substitution, and the Reserve Bank of India shall, if so requested by a depositor, invest in approved securities the whole or any part of a deposit made originally in cash or the whole or any part of cash received by the Bank on sale of or on the maturing of securities lodged by the depositor.

(10) If any part of a deposit made under this section is used in the discharge of any liability of the insurer, the insurer shall deposit such additional sum in cash or approved securities as will make up the amount so used. The insurer shall be deemed to have failed to comply with the requirements of sub-section (1), unless the deficiency is supplied within a period of two months from the date when the deposit or any part thereof is so used for discharge of liabilities.

**8. Reservation of deposits.**—(1) Any deposit made under section 7 or section 98 shall be deemed to be part of the assets of the insurer but shall not be susceptible of any assignment or charge; nor shall it be available for the discharge of any liability of the insurer other than liabilities arising out of policies of insurance issued by the insurer so long as any such liabilities remain undischarged; nor shall it be liable to attachment in execution of any decree except a decree obtained by a policy-holder of the insurer in respect of a debt due upon a policy which debt the policy-holder has failed to realise in any other way.

(2) Where a deposit is made in respect of life insurance business the deposit made in respect thereof shall not be available for the discharge of any liability of the insurer other than liabilities arising out of policies of life insurance issued by the insurer.

**9. Refund of deposits.**—Where an insurer has ceased to carry on in British India any class of insurance business in respect of which a deposit has been made under section 7 or section 98 and his liabilities in British India in respect of business of that class have been satisfied or are otherwise provided for, the Court may, on the application of the insurer, order the return to the insurer of so much of the deposit as does not relate to the classes of insurance, if any, which he continues to carry on.

**10. Separation of accounts and funds.**—(1) Where the insurer carries on business of more than one of the classes specified in clauses (a),

(b), (c) and (d) of sub-section (1) of section 7, he shall keep a separate account of all receipts and payments in respect of each such class of insurance business.

(2) Where the insurer carries on the business of life insurance, the excess of receipts over payments in respect of such business shall be carried to and shall form a separate fund to be called the life insurance fund and the deposit made by the insurer in respect of life insurance business shall be deemed to be part of such fund.

(3) The life insurance fund shall be as absolutely the security of the life policy-holders as though it belonged to an insurer carrying on no other business than life insurance business and shall not be liable for any contracts of the insurer for which it would not have been liable had the business of the insurer been only that of life insurance and shall not be applied directly or indirectly save as provided in section 49 for any purposes other than those of life insurance.

**11. Accounts and balance-sheet.**—(1) Every insurer, in the case of an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall, at the expiration of each calendar year, prepare with reference to that year—

(a) in accordance with the regulations contained in Part I of the First Schedule, a balance-sheet in the form set forth in Part II of that Schedule ;

(b) in accordance with the regulations contained in Part I of the Second Schedule, a profit and loss account in the forms set forth in Part II of that Schedule, except where the insurer carries on business of one class only of the classes specified in clauses (a), (b) and (c) of sub-section (1) of section 7 and no other business ;

(c) in respect of each class of insurance business carried on by him in accordance with the regulations contained in Part I of the Third Schedule, a revenue account in the form or forms set forth in Part II of that Schedule applicable to that class of insurance business.

(2) Unless the insurer is a company to which the Indian Companies Act, 1913, applies, the accounts and statements referred to in sub-section (1) shall be signed by the insurer, or in the case of a company by the chairman, if any, and two directors and the principal officer of the company, or in the case of a firm by two partners of the firm, and shall be accompanied by a statement containing the names and descriptions of the persons in charge of the management of the business during the period to which such accounts and statements refer and by a report by such persons on the affairs of the business during that period.

(3) Where an insurer carrying on the business of insurance at the commencement of this Act has prepared the balance-sheet and accounts required by the Indian Life Assurance Companies Act, 1912, or has based his accounts upon the financial and not the calendar year, the provisions of this section shall, if the Central Government so directs in any case, apply until the 31st day of December, 1939, as if in sub-section (1) references to the calendar year were references to the financial year.

**12. Audit.**—The balance-sheet, profit and loss account, revenue account and profit and loss appropriation account of every insurer, in the case of an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall, unless they are subject to audit under the Indian Companies Act, 1913, be audited annually by an auditor, and the auditor shall in the audit of all such accounts have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities and penalties imposed on, auditors of companies by section 145 of the Indian Companies Act, 1913.

**13. Actuarial report and abstract.**—(1) Every insurer carrying on life insurance business shall, in respect of the life insurance business transacted by him in India, and also in the case of an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2 in respect of all life insurance business transacted by him, once at least in every five years cause an investigation to be made by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations contained in Part I of the Fourth Schedule and in conformity with the requirements of Part II of that Schedule.

(2) The provisions of sub-section (1) regarding the making of an abstract shall apply whenever at any other time an investigation into the financial condition of the insurer is made with a view to the distribution of profits or an investigation is made of which the results are made public.

(3) There shall be appended to every such abstract as is referred to in sub-section (1) or sub-section (2) a certificate signed by the principal officer of the insurer that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(4) There shall be appended to every such abstract a statement, in conformity with the requirements of Part II of the Fifth Schedule and prepared in accordance with the regulations contained in Part I of that Schedule, of the life insurance business in force at the date to which the accounts of the insurer are made up for the purposes of such abstract :

Provided that, if the investigation referred to in sub-sections (1) and (2) is made annually by any insurer, the statement need not be appended every year but shall be appended at least once in every five years.

(5) Where an investigation into the financial condition of an insurer is made as at a date other than the expiration of the year of account, the accounts for the period since the expiration of the last year of account and the balance-sheet as at the date at which the investigation is made shall be prepared and audited in the manner provided by this Act.

**14. Register of policies and register of claims.**—Every insurer, in the case of an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2 in respect of all business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall maintain—

- (a) a register or record of policies, in which shall be entered, in respect of every policy issued by the insurer, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice, and
- (b) a register or record of claims, in which shall be entered every claim made together with the date of the claim, the name and address of the claimant and the date on which the claim was discharged, or, in the case of a claim which is rejected, the date of rejection and the grounds therefor.

**15. Submission of returns.**—(1) The audited accounts and statements referred to in section 11 and the abstract and statement referred to in section 13 shall be printed, and four copies thereof shall be furnished as returns to the Superintendent of Insurance within six months from the end of the period to which they refer. The Superintendent of Insurance may extend the time allowed for furnishing the abstract and statement referred to in section 13 by a period not exceeding three months:

Provided that the said period of six months shall in the case of insurers having their principal place of business or domicile outside India and in the case of insurers constituted, incorporated or domiciled in British India but also carrying on business outside India be extended by three months, and provided further that the Central Government may, in any case extend the time allowed by this sub-section for the furnishing of such returns by a further period not exceeding three months.

(2) Of the four copies so furnished one shall be signed in the case of a company by the chairman and two directors and by the principal officer of the company and, if the company has a managing director or managing agent, by that director or managing agent, in the case of a firm, by two partners of the firm, and, in the case of an insurer being an individual, by the insurer himself.

(3) Where the insurer's principal place of business or domicile is outside British India, he shall forward to the Superintendent of Insurance, along with the documents referred to in section 11, the balance-sheet, profit and loss account and revenue account and the valuation report and valuation statements, if any, which the insurer is required to file with the public authority of the country in which the insurer is constituted, incorporated or domiciled, or, where such documents are not required to be filed, a certified statement showing the total assets and liabilities of the insurer at the close of the period covered by the said documents and his total income and expenditure during that period.

**16. Returns by insurers established outside British India.**—

(1) Where, by the law of the country in which an insurer, not being an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2, is constituted, incorporated or domiciled, the insurer is required to prepare and to furnish to a public authority of that country documents of substantially the same nature as the documents required to be furnished as returns in accordance with the provisions of section 15, the provisions of sub-section (2) of this section shall apply to such insurer in lieu of the provisions of sections 11, 12, 13 and 15.

(2) The insurer shall, within the time specified in sub-section (1) of section 15, furnish to the Superintendent of Insurance four certified copies in the English language of every balance-sheet, account, abstract,

report and statement supplied to the public authority referred to in sub-section (1) of this section, and, in addition thereto, four certified copies in the English language of each of the following statements, namely :—

- (a) a statement audited by a person duly qualified under the law of the insurer's country showing the assets held by the insurer in India.
- (b) for each class of insurance business carried on by him, a revenue account in the form or forms set forth in Part II of the Third Schedule applicable to that class of business, and similarly audited, showing separately with respect to business transacted by the insurer in India the details required to be supplied in a revenue account furnished under this clause of this sub-section,
- (c) an abstract of the valuation report in respect of all life insurance business transacted by the insurer in India, prepared in the manner required by sub-section (1) of section 13, and
- (d) a declaration in the prescribed form stating that all amounts received by the insurer directly or indirectly whether from his head office or from any other source outside India have been shown in the revenue account except such sums as properly appertain to the capital account.

**17. Exemption from certain provisions of the Indian Companies Act, 1913.**—Where an insurer, being a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, in any year furnishes his balance-sheet and accounts in accordance with the provisions of section 15, he may at the same time send to the Registrar of Companies copies of such balance-sheet and accounts; and where such copies are so sent it shall not be necessary for the company to file copies of the balance-sheet and accounts with the Registrar as required by sub-section (1) of section 134 of that Act and such copies so sent shall be dealt with in all respects as if they were filed in accordance with that section.

**17A. This Act not to apply to preparation of accounts, etc., for periods prior to this Act coming into force.**—Nothing in this Act shall apply to the preparation of accounts by an insurer and the audit and submission thereof in respect of any accounting year which has expired prior to the commencement of this Act, and notwithstanding the other provisions of this Act, such accounts shall be prepared, audited and submitted in accordance with the law in force immediately before the commencement of this Act.

**18. Furnishing reports.**—Every insurer shall furnish to the Superintendent of Insurance a certified copy of every report on the affairs of the concern which is submitted to the members or policy-holders of the insurer immediately after its submission to the members or policy-holders, as the case may be.

**19. Abstract of proceedings of general meetings.**—Every insurer, being a company or body incorporated under any law for the time being in force in British India, shall furnish to the Superintendent of Insurance an abstract of the proceedings of every general meeting within thirty days from the holding of the meeting to which it relates.

**20. Custody and inspection of documents, and supply of copies.**—(1) Every return furnished to the Superintendent of Insurance or a certified copy thereof shall be kept by the Superintendent and shall be open to inspection; and any person may procure a copy of any such return, or of any part thereof, on payment of a fee of six annas for every hundred words or fractional part thereof required to be copied, any five figures being deemed equivalent to one word.

(2) A printed or certified copy of the accounts, statements and abstract furnished in accordance with the provisions of section 15 or section 16 shall, on the application of any shareholder or policy-holder made at any time within two years from the date on which the document was so furnished, be supplied to him by the insurer within fourteen days when the insurer is constituted, incorporated or domiciled in British India and in any other case within one month of such application.

(3) A copy of the memorandum and articles of association of the insurer if a company shall, on the application of any policy-holder, be supplied to him by the insurer on payment of one rupee.

**21. Powers of Superintendent of Insurance regarding returns.**—(1) If it appears to the Superintendent of Insurance that any return furnished to him under the provisions of this Act is inaccurate or defective in any respect, he may—

- (a) require from the insurer such further information, certified if he so directs by an auditor or actuary, as he may consider necessary to correct or supplement such return;
- (b) call upon the insurer to submit for his examination at the principal place of business of the insurer in British India any book of account, register or other document or to supply any statement which he may specify in a notice served on the insurer for the purpose;
- (c) examine any officer of the insurer on oath in relation to the return;
- (d) decline to accept any such return unless the inaccuracy has been corrected or the deficiency has been supplied before the expiry of one month from the date on which the requisition asking for correction of the inaccuracy or supply of the deficiency was delivered to the insurer and if he declines to accept any such return, the insurer shall be deemed to have failed to comply with the provisions of section 15 or section 16 relating to the furnishing of returns.

(2) The Court may on the application of an insurer and after hearing the Superintendent cancel any order made by the Superintendent under clause (a), (b) or (c) of sub-section (1) or may direct the acceptance of any return which the Superintendent has declined to accept, if the insurer satisfies the Court that the action of the Superintendent was in the circumstances unreasonable.

**22. Power of Superintendent of Insurance to order re-valuation.**—If it appears to the Superintendent of Insurance that an investigation or valuation to which section 13 refers does not properly indicate the condition of the affairs of the insurer by reason of the faulty basis adopted in the valuation, he may, after giving notice to the insurer and giving him an opportunity to be heard, cause an investigation and

valuation to be made at the expense of the insurer by an actuary appointed by the insurer for this purpose and approved by the Superintendent of Insurance.

**23. Evidence of documents.**—(1) Every return furnished to the Superintendent of Insurance, which has been certified by the Superintendent to be a return so furnished, shall be deemed to be a return so furnished.

(2) Every document, purporting to be certified by the Superintendent of Insurance to be a copy of a return so furnished, shall be deemed to be a copy of that return and shall be received in evidence as if it were the original return, unless some variation between it and the original return is proved.

**24. Summary of returns to be published.**—The Central Government shall every year cause to be published, in such manner as it may direct, a summary of the accounts, balance-sheets, statements, abstracts and other returns under this Act or purporting to be under this Act which have been furnished to the Superintendent of Insurance for the year preceding the year of publication and may append to such summary any note of the Central Government and any correspondence in relation thereto.

**25. Returns to be published in statutory forms.**—No insurer shall publish in British India any return in a form other than that in which it has been furnished to the Superintendent of Insurance :

Provided that nothing contained in this section shall prevent an insurer from publishing a true and accurate abstract from such return for the purposes of publicity.

**26. Alterations in the particulars furnished with application for registration to be reported.**—Whenever any alteration occurs or is made which affects any of the matters which are required under the provisions of sub-section (2) of section 3 to accompany an application by an insurer for registration, the insurer shall forthwith furnish to the Superintendent of Insurance full particulars of such alteration.

#### INVESTMENT, LOANS AND MANAGEMENT.

**27. Investment of assets and restriction on loans.**—(1) Every insurer incorporated or domiciled in British India shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than fifty-five per cent of the sum of the amount of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 or section 98 by the insurer in respect of his life insurance business and less any amount due to the insurer for loans granted by him on policies of life insurance maturing for payment in India and within their surrender values, in the manner following, namely, twenty-five per cent of the said sum in Government securities and a further sum equal to not less than thirty per cent of the said sum in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

*Explanation.*—The provisions of this sub-section shall apply also to insurers incorporated in or domiciled in the United Kingdom.

(2) An insurer incorporated or domiciled elsewhere than in British India or the United Kingdom shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than the sum of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 or section 98 by the insurer in respect of his life insurance business and less any amount due to the insurer on loans granted by him on policies of life insurance maturing for payment in India and within their surrender values in the manner following, namely, thirty-three and one-third per cent of the said sum in Government securities, and the balance in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

(3) An insurer carrying on business at the commencement of this Act to whom sub-section (1) or sub-section (2) applies shall, before the expiry of four years from the commencement of this Act, invest the total amount required to be invested by those sub-sections in the manner required thereby :

Provided that of such total amount the insurer shall have invested not less than one-fourth in securities of the nature specified in sub-section (1) before the expiry of one year, not less than one-half before the expiry of two years, and not less than three-fourths before the expiry of three years from the commencement of this Act.

(4) The assets required by this section to be held invested by an insurer to whom sub-section (2) applies shall be held in trust for the discharge of claims of the nature referred to in sub-section (2) and shall be vested in trustees resident in British India and approved by the Central Government by an instrument of trust which shall be executed by the insurer and approved by the Central Government and shall define the manner in which alone the subject-matter of the trust shall be dealt with.

*Explanation.*—Sub-sections (2) and (4) shall apply to an insurer incorporated in British India whose share capital to the extent of one-third is owned by, or the members of whose Governing Body to the extent of one-third consists of, individual domiciled elsewhere than in British India or the United Kingdom.

**28. Statement of investments of assets.**—(1) Every insurer registered under this Act carrying on the business of life insurance, not being a provident society, shall twice in every year, namely, within thirty-one days of the 30th day of June and within thirty-one days of the 31st day of December, submit to the Superintendent of Insurance a statement showing as at the said dates the assets held invested in accordance with section 27 and such statement shall be certified by a principal officer of the insurer.

(2) The Superintendent of Insurance shall be entitled at any time to take such steps as he may consider necessary for the inspection or verification of the assets invested in compliance with section 27 and the insurer shall comply with all requisitions made by the Superintendent in that behalf.

**29. Prohibition of loans.**—No insurer shall grant loans or temporary advances either on hypothecation of property or on personal security or otherwise, except loans on life policies issued by him within their surrender value, to any director, manager, managing agent, actuary, auditor or officer of the insurer if a company, or where the insurer is a firm, to any partner therein, or to any other company or firm in which any such director, manager, managing agent, actuary, officer or partner holds the position of a director, manager, managing agent, actuary, officer or partner :

Provided that nothing herein contained shall apply to loans made by an insurer to a banking company :

Provided further that every existing loan to any director, manager, managing agent, auditor, actuary, officer or partner, notwithstanding any contract to the contrary, shall be repaid within one year from the commencement of this Act, and in case of default, such defaulting director, manager, managing agent, auditor, actuary, officer or partner shall cease to hold office on the expiry of one year from the commencement of this Act :

Provided further that nothing in this section shall prohibit a company from granting such loans or advances to a subsidiary company or to any other company of which the company granting the loan or advance is a subsidiary company.

**30. Liability of directors, etc., for loss due to contraventions of sections 27 and 29.**—If, by reason of a contravention of any of the provisions of section 27 or section 29, any loss is sustained by the insurer or by the policy-holders, every director, manager, managing agent, officer or partner who is knowingly a party to such contravention shall, without prejudice to any other penalty to which he may be liable under this Act, be jointly and severally liable to make good the amount of such loss.

**31. Assets of insurer how to be kept.**—None of the assets in British India of any insurer shall, except in the case of deposits made with the Reserve Bank of India under section 7 or section 98 or in so far as assets are required to be vested in trustees by sub-section (4) of section 27, be kept otherwise than in the name of a public officer approved by the Central Government or in the corporate name of the undertaking, if a company, or in the name of the partners, if a firm, or in the name of the proprietor, if an individual.

**32. Limitation on employment of managing agents and on the remuneration payable to them.**—(1) No insurer shall, after the commencement of this Act, appoint a managing agent for the conduct of his business.

(2) Where any insurer engaged in the business of insurance before the commencement of this Act employs a managing agent for the conduct of his business, then, notwithstanding anything to the contrary contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in the articles of the insurer, if a company, or in any agreement entered into by the insurer, such managing agent shall cease to hold office on the expiry of three years from the commencement of this Act and no compensation shall be payable to him by the insurer by reason only of the premature termination of his employment as managing agent.

(3) After the commencement of this Act, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in any agreement entered into by an insurer or in the articles of association of an insurer being a company, no insurer shall pay to a managing agent and no managing agent shall accept from an insurer as remuneration for his services as managing agent more than two thousand rupees per month in all, including salary and commission and other remuneration payable to and receivable by him, for his services as managing agent.

INSPECTION.

**33. Power of Superintendent of Insurance to order inspection.**—(1) If the Superintendent of Insurance has reason to believe that the interests of the policy-holders of an insurer are in danger or that an insurer is unable to meet his obligations or has made default in complying with any of the provisions of this Act, or that an offence under this Act has been or is likely to be committed by an insurer or any officer of an insurer, or if he receives a requisition in this behalf signed by shareholders of an insurer being a company not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or if he receives a requisition in this behalf signed by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees and supported by an affidavit, he may, after giving notice to the insurer and giving him an opportunity to be heard, appoint an auditor or actuary or both, not being an auditor or actuary in the employ of the insurer, to investigate the affairs of the insurer, or may himself make such investigation.

(2) The Court may, on the application of an insurer and after giving notice to and hearing the Superintendent of Insurance, forbid such action by the Superintendent, if the insurer satisfies the Court that it is unnecessary in the circumstances.

(3) The results of any investigation made under this section shall be embodied in a report of which one copy shall be lodged with the Superintendent of Insurance and one copy shall be furnished to the insurer; and a copy of such report shall be furnished to the policy-holders who have sent a requisition for such an investigation.

(4) The Superintendent of Insurance may require the insurer to comply within a time to be specified by him (not being less than fifteen days from the receipt of the notice by the insurer) with any directions he may issue to remedy defects disclosed by such inspection.

(5) If, as a result of any investigation made under this section, the Superintendent of Insurance is of opinion that it is necessary in the interests of the policy-holders that the business of the insurer should be wound up, or if the insurer fails to comply with any directions issued under sub-section (4), the Superintendent may, after giving notice to the insurer and giving him an opportunity to be heard, apply to the Court to have the business of the insurer wound up.

**34. Powers of investigator.**—When any investigation is made in pursuance of section 33 the provisions of section 140 of the Indian

Companies Act, 1913, shall apply for the purposes of such investigation as they apply to an investigation made in pursuance of section 138 of that Act, and all expenses of and incidental to such investigation shall be defrayed by the insurer.

#### AMALGAMATION AND TRANSFER OF INSURANCE BUSINESS.

**35. Amalgamation and transfer of insurance business.—(1)** No life insurance business of an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2 shall be transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared under this section and sanctioned by the Court having jurisdiction over one or other of the insurers concerned.

(2) Any scheme prepared under this section shall set out the agreement under which the transfer or amalgamation is proposed to be effected, and shall contain such further provisions as may be necessary for giving effect to the scheme.

(3) Before an application is made to the Court to sanction any such scheme, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reason therefor shall, at least two months before the application is made, be sent to the Central Government, and certified copies of the following documents shall be furnished to the Central Government and shall during the two months aforesaid be kept open for the inspection of the members and policy-holders at the principal and branch offices and chief agencies of the insurers concerned, namely :—

- (a) a draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer ;
- (b) statements of the assets and liabilities of the insurers concerned in such amalgamation or transfer ; and
- (c) the actuarial or other reports on which the scheme was founded including a report by an independent actuary on the proposed amalgamation or transfer.

(4) Where an application under sub-section (3) is made to the Court within three months from the commencement of this Act, the Court may, on application, extend for the insurer whose business is to be transferred to or amalgamated with the business of another insurer, the time allowed for registration under section 3 and for the payment of the instalments of the deposit under section 7 or section 98 for such period not exceeding nine months as the Court may think fit.

**36. Sanction of amalgamation and transfer by Court.—**When any application such as is referred to in sub-section (3) of section 35 is made to the Court, the Court shall cause, if for special reasons it so directs, notice of the application to be sent to every person resident in British India or in an Indian State who is the holder of a life policy of any insurer concerned and shall cause a statement of the nature and terms of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as it may direct, and, after hearing the directors and such policy-holders as apply to be heard and any other persons whom it considers entitled to be heard, may sanction the arrangement, if it is satisfied that no sufficient objection to the arrangement has been established.

**37. Statements required after amalgamation and transfer.—**

Where an amalgamation takes place between any two or more insurers, or where any business of one insurer is transferred to another, whether in accordance with a scheme confirmed by the Court or otherwise, the insurer carrying on the amalgamated business or the insurer to whom the business is transferred, as the case may be, shall, within three months from the date of the completion of the amalgamation or transfer, furnish to the Central Government—

- (a) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and
- (b) a declaration signed by every insurer concerned or in the case of a company by the chairman and the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer, and
- (c) where the amalgamation or transfer has not been made in accordance with a scheme confirmed by the Court—
  - (i) certified copies of statements of the assets and liabilities of the insurers concerned, and
  - (ii) certified copies of the actuarial or other reports upon which the agreement or deed was founded.

**ASSIGNMENT OR TRANSFER OF POLICIES AND NOMINATIONS.**

**38. Assignment and transfer of insurance policies.—(1)** A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness, specially setting forth the fact of transfer or assignment.

(2) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but except where the transfer or assignment is in favour of the insurer shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment together with either the said endorsement or instrument itself or a copy thereof certified to be correct by both transferor and transferee or their duly authorised agents has been delivered to the insurer :

Provided that where the insurer maintains one or more places of business in British India, such notice shall be delivered only at the place in British India mentioned in the policy for the purpose or at his principal place of business in British India.

(3) The date on which the notice referred to in sub-section (2) is delivered to the insurer shall regulate the priority of all claims under a transfer or assignment as between persons interested in the policy ; and where there is more than one instrument of transfer or assignment the

priority of the claims under such instruments shall be governed by the order in which the notices referred to in sub-section (2) are delivered.

(4) Upon the receipt of the notice referred to in sub-section (2), the insurer shall record the fact of such transfer or assignment together with the date thereof and the name of the transferee or the assignee and shall, on the request of the person by whom the notice was given, or of the transferee or assignee, on payment of a fee not exceeding one rupee, grant a written acknowledgment of the receipt of such notice; and any such acknowledgment shall be conclusive evidence against the insurer that he has duly received the notice to which such acknowledgment relates.

(5) Subject to the terms and conditions of the transfer or assignment, the insurer shall, from the date of the receipt of the notice referred to in sub-section (2), recognise the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

(6) Any rights and remedies of an assignee or transferee of a policy of life insurance under an assignment or transfer effected prior to the commencement of this Act shall not be affected by the provisions of this section.

(7) Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the lifetime of the person whose life is insured, and an assignment in favour of the survivor or survivors of a number of persons, shall be valid.

**39. Nomination by policy-holder.**—(1) The holder of a policy of life insurance on his own life, not being an absolute assignee of the benefits under the policy, may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death.

(2) Any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may, at any time before the policy matures for payment, be cancelled or changed by an endorsement or a further endorsement or a will, as the case may be; but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made *bona fide* by him to a nominee mentioned in the text of the policy or registered in records of the insurer.

(3) The insurer shall furnish to the policy-holder a written acknowledgment of having registered a nomination or a cancellation or change thereof, and may charge a fee not exceeding one rupee for registering such cancellation or change.

(4) A transfer or assignment of a policy made in accordance with section 38 shall automatically cancel a nomination.

(5) Where the policy matures for payment during the lifetime of the person whose life is insured or where the nominee or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy-holder, or his heirs or legal representatives or the holder of a succession certificate, as the case may be.

(6) Where the nominee or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors.

(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies.

#### COMMISSION AND REBATES AND LICENSING OF AGENTS.

**40. Prohibition of payment by way of commission or otherwise for procuring business.**—(1) No person shall, after the expiry of six months from the commencement of this Act, pay or contract to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent or a person acting on behalf of an insurer who for the purposes of insurance business employs insurance agents.

(2) No insurance agent shall be paid or contract to be paid by way of commission or as remuneration in any form an amount exceeding, in the case of life insurance business, forty per cent of the first year's premium payable on any policy or policies effected through him and five per cent of a renewal premium, or, in the case of business of any other class, fifteen per cent of the premium :

Provided that insurers, in respect of life insurance business only, may pay, during the first ten years of their business, to their insurance agents fifty-five per cent of the first year's premium payable on any policy or policies effected through them and six per cent of the renewal premiums.

(3) Nothing in this section shall prevent the payment under any contract existing prior to the 27th day of January, 1937, of gratuities or renewal commission to any person, whether an insurance agent within the meaning of this Act or not, or to his representatives after his decease in respect of insurance business effected through him before the said date.

**41. Prohibition of rebates.**—(1) No person shall allow or offer to allow, either directly or indirectly, as an inducement to any person to effect or renew an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy, nor shall any person taking out or renewing a policy accept any rebate, except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer.

(2) Any person making default in complying with the provisions of this section shall be punishable with fine which may extend to one hundred rupees, unless the default is made by a person effecting or

renewing a policy, in which case he shall be punishable with fine which may extend to fifty rupees only.

**42. Licensing of insurance agents.**—(1) The Superintendent of Insurance or an officer authorised by him in this behalf shall, in the prescribed manner and on payment of the prescribed fee which shall not be more than one rupee, issue to any individual making an application under this section and not suffering from any of the disqualifications hereinafter mentioned a licence to act as an insurance agent for the purpose of soliciting or procuring insurance business.

(2) A licence issued under this section shall entitle the holder to act as an insurance agent for any registered insurer.

(3) A licence issued under this section shall expire on the 31st day of March in each year, but shall, if the applicant does not suffer from any of the disqualifications hereinafter mentioned, be renewed from year to year on payment of a fee of one rupee.

(4) The disqualifications above referred to shall be the following :—

- (a) that the person is a minor ;
- (b) that he is found to be of unsound mind by a Court of competent jurisdiction ;
- (c) that he has been found guilty of criminal misappropriation or criminal breach of trust or cheating by a Court of competent jurisdiction ;
- (d) that in the course of any judicial proceeding relating to any policy of insurance or the winding up of an insurance company or in the course of an investigation of the affairs of an insurer it has been found that he has been guilty of or has knowingly participated in or connived at any fraud, dishonesty or misrepresentation against an insurer or an assured.

(5) If it be found that an insurance agent suffers from any of the foregoing disqualifications, without prejudice to any other penalty to which he may be liable, the Superintendent of Insurance shall, and if the agent has knowingly contravened any provision of this Act may, cancel the licence issued to the agent under this section.

**43. Register of insurance agents.**—(1) Every insurer and every person who acting on behalf of an insurer employs licensed insurance agents shall maintain a register showing the name and address of every licensed insurance agent appointed by him and the date on which his appointment began and the date, if any, on which his appointment ceased.

(2) Any individual not holding a licence issued under section 42 who acts as an insurance agent shall be punishable with fine which may extend to fifty rupees, and any insurer who, or any person acting on behalf of an insurer who, appoints as an insurance agent any individual not so licensed, or transacts any insurance business in India through any such individual, shall be punishable with fine which may extend to one hundred rupees.

(3) The provisions of sub-section (2) shall not take effect until the day of six months from the commencement of this Act.

**44. Prohibition of cessation of payments of commission.**—Notwithstanding anything to the contrary in a contract between any person and an insurance agent licensed under section 42 forfeiting or stopping payment of renewal commission to such insurance agent, no such person shall in respect of life insurance business done in India refuse payment to an insurance agent of commission on renewal premiums due to him under the agreement by reason only of the termination of his agreement except for fraud :

Provided that such agent has served such person continually and exclusively for at least ten years, and provided further that, after his ceasing to act as agent, he does not directly or indirectly solicit or procure insurance business for any other person.

SPECIAL PROVISIONS OF LAW.

**45. Policy not to be called in question on ground of misstatement after two years.**—No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter and fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false.

**46. Application of British Indian law to policies issued in British India.**—The holder of a policy of insurance issued by an insurer in respect of insurance business transacted in British India after the commencement of this Act shall have the right, notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto, to receive payment in British India of any sum secured thereby and to sue for any relief in respect of the policy in any Court of competent jurisdiction in British India ; and if the suit is brought in British India any question of law arising in connection with any such policy shall be determined according to the law in force in British India.

**47. Payment of money into Court.**—(1) Where in respect of any policy of life insurance maturing for payment an insurer is of opinion that by reason of conflicting claims to or insufficiency of proof of title to the amount secured thereby or for any other adequate reason it is impossible otherwise for the insurer to obtain a satisfactory discharge for the payment of such amount, the insurer shall before the expiry of nine months from the date of the maturing of the policy or, where the circumstances are such that the insurer cannot be immediately aware of such maturing, from the date on which notice of such maturing is given to the insurer, apply to pay the amount into the Court within the jurisdiction of which is situated the place at which such amount is payable under the terms of the policy or otherwise.

(2) A receipt granted by the Court for any such payment shall be a satisfactory discharge to the insurer for the payment of such amount.

(3) An application for permission to make a payment into Court under this section shall be made by a petition verified by an affidavit signed by a principal officer of the insurer setting forth the following particulars, namely :—

- (a) the name of the insured person and his address ;
- (b) if the insured person is deceased, the date and place of his death ;
- (c) the nature of the policy and the amount secured by it ;
- (d) the name and address of each claimant so far as is known to the insurer with details of every notice of claim received ;
- (e) the reasons why in the opinion of the insurer a satisfactory discharge cannot be obtained for the payment of the amount ; and
- (f) the address at which the insurer may be served with notice of any proceeding relating to disposal of the amount paid into Court.

(4) An application under this section shall not be entertained by the Court if the application is made before the expiry of six months from the maturing of the policy by survival or from the date of receipt of notice by the insurer of the death of the insured, as the case may be.

(5) If it appears to the Court that a satisfactory discharge for the payment of the amount cannot otherwise be obtained by the insurer it shall allow the amount to be paid into Court and shall invest the amount in Government securities pending its disposal.

(6) The insurer shall transmit to the Court every notice of claim received after the making of the application under sub-section (3), and any payment required by the Court as costs of the proceedings or otherwise in connection with the disposal of the amount paid into Court shall as to the costs of the application under sub-section (3) be borne by the insurer and as to any other costs be in the discretion of the Court.

(7) The Court shall cause notice to be given to every ascertained claimant of the fact that the amount has been paid into Court, and shall cause notice at the cost of any claimant applying to withdraw the amount to be given to every other ascertained claimant.

(8) The Court shall decide all questions relating to the disposal of claims to the amount paid into Court.

**48. Directors of insurers being companies.**—(1) Where the insurer is a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, and carries on the business of life insurance, not less than one-fourth of the whole number of the directors of the company shall be persons having the prescribed qualifications and holding policies of life insurance issued by the company, and shall be elected to the Board of Directors of the company in the prescribed manner by the holders of policies of life insurance issued by the company.

(2) This section shall not take effect, in respect of any company in existence at the commencement of this Act, until the expiry of one year therefrom, and in respect of any company incorporated after the commencement of this Act, until the expiry of two years from the date of registration to carry on life insurance business.

**49. Restriction on dividends and bonuses.**—No insurer, being an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2, who carries on the business of life insurance shall in respect of such life insurance business declare or pay any dividend to shareholders or any bonus to policy-holders except out of a surplus ascertained as the result of an actuarial valuation of the assets and liabilities of the insurer.

**50. Notice of options available to the assured on the lapsing of a policy.**—An insurer shall, before the expiry of three months from the date on which the premiums in respect of a policy of life insurance were payable but not paid, give notice to the policy-holder informing him of the options available to him.

**51. Supply of copies of proposals and medical reports.**—Every insurer shall, on application by a policy-holder and on payment of a fee not exceeding one rupee, supply to the policy-holder certified copies of the questions put to him and his answers thereto contained in his proposal for insurance and in the medical report supplied in connection therewith.

**52. Prohibition of business on dividing principle.**—No insurer shall after the commencement of this Act begin, or after three years from that date continue to carry on, any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits:

Provided that nothing in this section shall be deemed to prevent an insurer from allocating bonuses to holders of policies of life insurance as a result of a periodical actuarial valuation either as reversionary additions to the sums insured or as immediate cash bonuses or otherwise:

Provided further that an insurer who continues to carry on insurance business on the dividing principle after the commencement of this Act shall withhold from distribution a sum of not less than forty per cent of the premiums received during each year after the commencement of this Act in which such business is continued so as to make up the amount required for investment under section 27.

#### WINDING UP.

**53. Winding up by the Court.**—(1) The Court may order the winding up in accordance with the Indian Companies Act, 1913, of any insurance company and the provisions of that Act shall, subject to the provisions of this Chapter, apply accordingly.

(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of an insurance company—

(a) if with the sanction of the Court previously obtained a petition in this behalf is presented by shareholders not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or by not less than fifty policy-holders holding policies of

life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees; or

- (b) if the Superintendent of Insurance, who is hereby authorised to do so, applies in this behalf to the Court on any of the following grounds, namely :—
- (i) that the company has failed to deposit or to keep deposited with the Reserve Bank of India the amounts required by section 7 or section 98,
  - (ii) that the company having failed to comply with any requirement of this Act has continued such failure for a period of three months after notice of such failure has been conveyed to the company by the Superintendent of Insurance,
  - (iii) that it appears from the returns furnished under the provisions of this Act or from the results of any investigation made thereunder that the company is insolvent, or
  - (iv) that the continuance of the company is prejudicial to the interests of the policy-holders.

**54. Voluntary winding up.**—Notwithstanding anything contained in the Indian Companies Act, 1913, an insurance company shall not be wound up voluntarily except for the purposes of effecting an amalgamation or a re-construction of the company, or on the ground that by reason of its liabilities it cannot continue its business.

**55. Valuation of liabilities.**—(1) In the winding up of an insurance company or in the insolvency of any other insurer the value of the assets and the liabilities of the insurer shall be ascertained in such manner and upon such basis as the liquidator or receiver in insolvency thinks fit, subject, so far as applicable, to the rule contained in the Sixth Schedule and to any directions which may be given by the Court.

(2) For the purposes of any reduction by the Court of the amount of the contracts of any insurance company the value of the assets and liabilities of the company and all claims in respect of policies issued by it shall be ascertained in such manner and upon such basis as the Court thinks proper having regard to the rule aforesaid.

(3) The rule in the Sixth Schedule shall be of the same force and may be repealed, altered or amended as if it were a rule made in pursuance of section 246 of the Indian Companies Act, 1913, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of insurance companies.

**56. Application of surplus assets of life insurance fund in liquidation or insolvency.**—(1) In the winding up of an insurance company and in the insolvency of any other insurer the value of the assets and the liabilities of the insurer in respect of life insurance business shall be ascertained separately from the value of any other assets or any other liabilities of the insurer and no such assets shall be applied to the discharge of any liabilities other than those in respect of life insurance business except in so far as those assets exceed the liabilities in respect of life insurance business.

(2) In the winding up of an insurance company carrying on the business of life insurance or in the insolvency of any other insurer carrying

on such business where any proportion of the profits of the insurer was before the commencement of the winding up or insolvency allocated to policy-holders, if, when the assets and liabilities of the insurer have been ascertained, there is found to be a surplus of assets over liabilities (hereinafter referred to as a *prima facie* surplus) there shall be added to the liabilities of the insurer in respect of the life insurance business an amount equal to such proportion of the *prima facie* surplus as is equivalent to such proportion of the profits allocated to shareholders and policy-holders as was allocated to policy-holders during the ten years immediately preceding the commencement of the winding up and the assets of the insurer shall be deemed to exceed his liabilities only in so far as those assets exceed those liabilities after such addition :

Provided that—

- (a) if in any case there has been no such allocation or if it appears to the Court that by reason of special circumstances it would be inequitable that the amount to be added to the liabilities of the insurer in respect of the life insurance business should be an amount equal to such proportion as aforesaid, the amount to be so added shall be such amount as the Court may direct, and
- (b) for the purpose of the application of this sub-section to any case where before the commencement of the winding up or insolvency a proportion of such profits as aforesaid of a branch only of the life insurance business in question has been allocated to policy-holders, the value of the assets and liabilities of the insurer in respect of that branch shall be separately ascertained in like manner as the value of his assets and liabilities in respect of the life insurance business was ascertained, and the surplus so found, if any, of assets over liabilities shall, for the purpose of determining the amount to be added to the liabilities of the insurer in respect of the life insurance business be deemed to be the *prima facie* surplus.

**57. Winding up of secondary companies.**—(1) Where the insurance business or any part of the insurance business of an insurance company has been transferred to another insurance company under an arrangement in pursuance of which the first mentioned company (in this section referred to as the secondary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section referred to as the principal company) then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the secondary company to be wound up in conjunction with the principal company and may by the same or any subsequent order appoint the same person to be liquidator for the two companies and make provision for such other matters as may seem to the Court necessary with a view to the companies being wound up as if they were one company.

(2) The commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the secondary company.

(3) In adjusting the rights and liabilities of the members of the several companies among themselves the Court shall have regard to the constitution of the companies and to the arrangements entered into

between the companies in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company or as near thereto as circumstances admit.

(4) Where any company alleged to be secondary is not in process of being wound up at the same time as the principal company to which it is alleged to be secondary, the Court shall not direct the secondary company to be wound up, unless, after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is secondary to the principal company and that the winding up of the company in conjunction with the principal company is just and equitable.

(5) An application may be made in relation to the winding up of any secondary company in conjunction with the principal company by any creditor of, or person interested in, the principal or secondary company.

(6) Where a company stands in the relation of a principal company to one insurance company and in the relation of a secondary company to some other insurance company or where there are several insurance companies standing in the relation of secondary companies to one principal company, the Court may deal with any number of such companies together or in separate groups as it thinks most expedient upon the principles laid down in this section.

**58. Schemes for partial winding up of insurance companies.**—(1) If at any time it appears expedient that the affairs of an insurance company in respect of any class of business comprised in the undertaking of the company should be wound up but that any other class of business comprised in the undertaking should continue to be carried on by the company or be transferred to another insurer, a scheme for such purposes may be prepared and submitted for confirmation of the Court in accordance with the provisions of this Act.

(2) Any scheme prepared under this section shall provide for the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets which may arise on the proposed winding up), for any future rights of every class of policy-holders in respect of their policies and for the manner of winding up any of the affairs of the company which are proposed to be wound up and may contain provisions for altering the memorandum of the company with respect to its objects and such further provisions as may be expedient for giving effect to the scheme.

(3) The provisions of this Act relating to the valuation of liabilities of insurers in liquidation and insolvency and to the application of surplus assets of the life insurance fund in liquidation or insolvency shall apply to the winding up of any part of the affairs of a company in accordance with the scheme under this section in like manner as they apply in the winding up of an insurance company, and any scheme under this section may apply with the necessary modifications any of the provisions of the Indian Companies Act, 1913, relating to the winding up of companies.

(4) An order of the Court confirming a scheme under this section whereby the memorandum of a company is altered with respect to its

object shall as respects the alteration have effect as if it were an order confirmed under section 12 of the Indian Companies Act, 1913, and the provisions of sections 15 and 16 of that Act shall apply accordingly.

**59. Return of deposits.**—In the winding up of an insurance company and in the insolvency of any other insurer the liquidator or assignee, as the case may be, shall apply to the Court for an order for the return of the deposit made by the company or the insurer, as the case may be, under section 7 or section 98 and the Court shall on such application order a return of the deposit subject to such terms and conditions as it shall direct.

**60. Notice of policy values.**—In the winding up of an insurance company for the purposes of a cash distribution of the assets and in the insolvency of any other insurer the liquidator or assignee, as the case may be, in the case of all persons appearing by the books of the company or other insurer to be entitled to or interested in the policies granted by the company or other insurer shall ascertain the value of the liability of the company or other insurer to each such person and shall give notice of such value to those persons in such manner as the Court may direct and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in such manner and within such time as may be specified by a rule or order of the Court.

**61. Power of Court to reduce contracts of insurance.**—(1) Where an insurance company is in liquidation or any other insurer is insolvent the Court may make an order reducing the amount of the insurance contracts of the company or other insurer upon such terms and subject to such conditions as the Court thinks just.

(2) Where a company carrying on the business of life insurance has been proved to be insolvent, the Court may, if it thinks fit in place of making a winding up order, reduce the amount of the insurance contracts of the company upon such terms and subject to such conditions as the Court thinks fit.

(3) Application for an order under this section may be made either by the liquidator or by or on behalf of the company or by a policyholder or by the Superintendent of Insurance, and the Superintendent of Insurance and any person whom the Court thinks likely to be affected shall be entitled to be heard on any such application.

#### **SPECIAL PROVISIONS RELATING TO EXTERNAL COMPANIES.**

**62. Power of Central Government to impose reciprocal disabilities on non-Indian companies.**—Where, by the law or practice of any country outside India in which an insurer carrying on insurance business in British India is constituted, incorporated or domiciled, insurance companies incorporated in British India are required as a condition of carrying on insurance business in that country to comply with any special requirement whether as to the keeping of deposits or assets in that country or otherwise which is not imposed upon insurers of that country under this Act, the Central Government shall, if satisfied of the existence of such special requirement, by notification in the official

Gazette, direct that the same requirement, or requirements as similar thereto as may be, shall be imposed upon insurers of that country as a condition of carrying on the business of insurance in British India.

**63. Particulars to be filed by insurers established outside British India.**—Every insurer, having his principal place of business or domicile outside British India, who establishes a place of business within British India, or appoints a representative in British India with the object of obtaining insurance business, shall, within three months from the establishment of such place of business or the appointment of such representative, file with the Superintendent of Insurance—

- (a) a certified copy of the charter, statutes, deed of settlement or memorandum and articles or other instrument constituting or defining the constitution of the insurer, and, if the instrument is not written in the English language, a certified translation thereof,
- (b) a list of the directors, if the insurer is a company,
- (c) the name and address of some one or more persons resident in British India authorised to accept on behalf of the insurer service of process and any notice required to be served on the insurer, together with a copy of the power of attorney granted to him,
- (d) the full address of the principal office of the insurer in British India,
- (e) a statement of the classes of insurance business to be carried on by the insurer, and
- (f) a statement verified by an affidavit setting forth the special requirements, if any, of the nature specified in section 62 imposed in the country of origin of the insurer on Indian nationals,

and, in the event of any alteration being made in the address of the principal office or in the classes of business to be carried on, or in any instrument here referred to, or in the name of any of the persons here referred to, or in the matters specified in clause (f) above, the company shall forthwith furnish to the Superintendent of Insurance particulars of such alteration.

**64. Books to be kept by insurers established outside British India.**—Every insurer having his principal place of business or domicile outside British India shall keep at his principal office in British India such books of account, registers and documents as will enable the accounts, statements and abstracts which he is required under this Act to furnish to the Superintendent of Insurance in respect of the insurance business transacted by him in India to be compiled and, if necessary, checked by the Superintendent of Insurance.

### PART III.

#### PROVIDENT SOCIETIES.

**65. Definition of "provident society".**—In this Part "provident society" means a person who, or a body of persons whether corporate or unincorporate which, receives premiums or contributions for securing

annuities on human life or receives premiums or contributions for insuring money to be paid on the happening of any of the following contingencies, namely:—

- (a) the birth, marriage, death of any person or the survival by a person of a stated age or contingency ;
- (b) failure of issue ;
- (c) the occurrence of a social, religious or other ceremonial occasion ;
- (d) loss of or retirement from employment ;
- (e) disablement in consequence of sickness or accident ;
- (f) the necessity of providing for the education of a dependant ; and
- (g) any other contingency which may be prescribed or which may be authorised by the Provincial Government with the approval of the Central Government.

**66. Application of this Part.**—Nothing in this Part shall apply to a provident society which pays or undertakes to pay on any policy of insurance an annuity exceeding fifty rupees or a gross sum exceeding five hundred rupees exclusive of any profit or bonus :

Provided that for the purposes of this section contracts entered into before the commencement of this Act shall not be taken into consideration and provided further that " policy " includes a series of policies covering one or more of the contingencies specified in section 65.

**67. Name.**—No provident society established after the commencement of this Act shall adopt as its name, and no provident society established before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name, any combination of words which fails to include the word " provident " or which includes the word " life ".

**68. Insurable interest.**—No provident society shall receive any premium or contribution for insuring money to be paid to any person other than the person paying such premium or contribution or the wife, husband, child, grandchild, parent, brother or sister, nephew or niece of such a person.

**69. Dividing business.**—(1) No provident society shall carry on any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution, amongst policies maturing for payment within certain time limits, of certain sums.

(2) The Superintendent of Insurance shall, as soon as possible, take steps to have any provident society which carries on business on the dividing principle wound up :

Provided that, where any such provident society in existence at the commencement of this Act applies within three months of such commencement to the Superintendent of Insurance for permission to continue carrying on its business with a view meanwhile to reorganise its business in accordance with the provisions of this Act, the Superintendent of Insurance may at his discretion, with due regard to the past history of the society, permit the society to continue business for a period not

exceeding two years from the date of receipt of such permission, so however that no new business on the dividing principle is undertaken by the society.

**70. Registration.**—(1) No provident society except a provident society registered under the provisions of the Provident Insurance Societies Act, 1912, shall receive any premium or contribution until it has obtained from the Superintendent of Insurance a certificate of registration.

(2) Every application for registration shall be accompanied by—

- (a) a certified copy of the rules of the society, and when the society is a company incorporated under the Indian Companies Act, 1913, a certified copy of the Memorandum and Articles of Association or where the society is not such a company a certified copy of the deed of constitution of the society ;
- (b) the names and addresses of the proprietors or directors, and the managers of the society ;
- (c) a certificate from the Reserve Bank of India that the initial deposit referred to in section 73 has been made ; and
- (d) a declaration verified by an affidavit that the minimum working capital required by section 72 is available.

(3) The Superintendent of Insurance may refuse to issue a certificate of registration until he is satisfied that the rules of the society comply with the provisions of this Act and that the minimum working capital required by section 72 is available, but if he is so satisfied he shall register the society and its rules.

(4) The Superintendent of Insurance may, after giving previous notice in writing in such manner as he thinks fit specifying the grounds for the proposed cancellation, and allowing the society concerned an opportunity of being heard, apply to the Court and obtain sanction for cancellation of the registration made under this section or made under the provisions of the Provident Insurance Societies Act, 1912,—

(a) if he is satisfied as the result of an inquiry made under section 87—

- (i) that the society is insolvent or is likely to become so, or
- (ii) that the business of the society is conducted fraudulently or not in accordance with the rules thereof, or that it is in the interests of the policy-holders that the society should cease to carry on business,

(b) if the initial deposit or any of the further deposits required by section 73 has not been made, or

(c) if the society, having failed to comply with any requirement of this Act, has continued such failure for a period of one month after notice of such failure has been conveyed to the society by the Superintendent of Insurance :

Provided that the Superintendent of Insurance may, if he thinks fit, instead of applying for cancellation of the registration under sub-clause (i) of clause (a) of this sub-section make a recommendation to the Court that the contracts of the society should be reduced in such manner and subject to such conditions as he may indicate.

**71. Prohibition of managing agents.**—The provisions of section 32 shall apply to provident societies as they apply to insurers.

**72. Working capital.**—No provident society established after the commencement of this Act shall be registered unless it has a paid up capital sufficient to provide as working capital a net sum of not less than five thousand rupees exclusive of deposits made under this Act and exclusive in the case of a company of any expenses incurred in connection with the formation of the company.

**73. Deposits.**—(1) Every provident society shall, if established before the commencement of this Act within one year from such commencement, or, if established after the commencement of this Act before the society applies for registration under section 70, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank, for and on behalf of the Central Government, cash or approved securities amounting at the market value of the securities on the date of deposit to five thousand rupees, and shall thereafter make in each calendar year a further deposit amounting to not less than one-fifth of the gross premium income for the preceding calendar year (including admission fees and other fees received by the society) until the total amount so deposited and kept is fifty thousand rupees.

(2) The provisions of sub-sections (8), (9) and (10) of section 7 and of sub-section (1) of section 8 shall apply to the deposits made under this section as they apply to deposits made by an insurer.

**74. Rules.**—(1) Every provident society established after the commencement of this Act shall in its rules set forth—

- (a) the name, the object and the location of the registered office of the society ;
- (b) the contingencies or classes of contingency on the happening of which money is to be paid ;
- (c) the conditions to be complied with before, and the payments to be made on, admission to the society ;
- (d) the rates of premium or contribution, and the periods for which or the times at which premiums or contributions are payable ;
- (e) the maximum amount payable to a subscriber or policy-holder ;
- (f) the nature and amounts of the benefits provided for by the society ;
- (g) the circumstances in which a bonus may be paid to a policy-holder ;
- (h) the nature of the evidence required for the proof of the happening of any contingency on which money is to be paid ;
- (i) the circumstances in which policies may be forfeited or renewed or the whole or a part of the premiums paid on a policy may be returned, or a surrender value of a policy may be granted ;
- (j) the penalties for delay in paying or failure to pay premiums or contributions ;
- (k) the proportion of the annual income of the society which may be disbursed on and the provisions to be made for meeting the expenses of the management of the society ;
- (l) the person or persons who or the authority which shall have power to invest the funds of the society ;

- (m) the provisions for appointment of auditors and their remuneration ;
- (n) the procedure to be adopted in altering the rules of the society ;
- (o) unless these are provided for in the articles of association of a society which is a company incorporated under the Indian Companies Act, 1913,—
  - (i) the mode of appointment and removal, the qualification and the powers of a director, manager, secretary or other officer of the society,
  - (ii) the manner of raising additional capital, and
  - (iii) the provisions for the holding of general meetings of the members and policy-holders and for the powers to be exercised and the procedure to be followed thereat ; and
- (p) such other matters as may be prescribed.

(2) Where the rules of any provident society registered under the Provident Insurance Societies Act, 1912, fail to comply with the provisions of this section the society shall, before the expiry of twelve months from the commencement of this Act, amend the rules so as to comply with these provisions.

**75. Amendment of rules.**—(1) No amendment of any rule of a provident society shall be valid until it has been sent to the Superintendent of Insurance and has been registered by him.

(2) The Superintendent of Insurance on being satisfied that the proposed amendment is not contrary to the provisions of this Act shall, unless he is of opinion that the amendment unfairly affects the rights of existing members or policy-holders of the society, issue to the society an acknowledgment of the registration of the amended rule.

**76. Supply of copy of rules.**—Every provident society shall on demand deliver free of cost to any member of the society a copy of the rules of the society and to any person other than a member a copy of such rules on the payment of a sum not exceeding one rupee.

**77. Registered office.**—Every provident society shall have an office (on the outside of which it shall keep displayed its name in a conspicuous position in legible characters) to which all communications and notices may be addressed, and shall give notice to the Superintendent of Insurance of any change in the location thereof within twenty-eight days of its occurrence.

**78. Publication of authorised capital to contain also subscribed and paid up capital.**—Where any notice, advertisement or other official publication of a provident society contains a statement of the amount of the authorised capital of the society, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

**79. Registers and books.**—Every provident society shall keep at its registered office—

- (a) a register of members in which shall be entered the name, address and occupation, if any, of every proprietor, director, manager or secretary and of every member of the society ;

- (b) a register or record of policies in which shall be entered, in respect of every policy issued by the society, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the society has notice ;
- (c) a register of claims in which shall be entered every claim made, together with the date of the claim, the name and address of the claimant and the date on which the claim is discharged or in the case of a claim which is rejected the date of rejection and the grounds therefor ;
- (d) a register of agents in which shall be entered the name and address of every agent employed by the society ;
- (e) a cash book in which shall be entered separately for each class of contingency separately specified in section 65 all sums received and expended by the society and the matters in respect of which the receipt or expenditure takes place ;
- (f) a ledger ; and
- (g) a journal.

**80. Revenue account, balance-sheet and annual statements.**—(1) Every provident society shall at the expiry of the calendar year prepare a revenue account and balance-sheet in the prescribed form verified in the prescribed manner, together with a report on the general state of the society's affairs and shall cause the revenue account and balance-sheet to be audited by an auditor, and the auditor shall so far as may be in the audit of a provident society have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities imposed on, an auditor of companies by section 145 of the Indian Companies Act, 1913.

(2) Every provident society shall at the expiry of the calendar year prepare with respect to that year—

- (a) a statement showing separately for each class of contingency separately specified in section 65—
  - (i) the number of new policies effected, the total amount insured thereby and the total premium income received in respect thereof and the number of existing policies discontinued during the year with the total amount insured thereby, and
  - (ii) the total amount of claims made and the total amount paid in satisfaction thereof ;
- (b) a statement showing details of every insurance effected on a life other than the life of the person insuring ; and
- (c) a statement showing the total amount paid as allowances to agents and canvassers.

(3) Until the expiry of two years from the commencement of this Act this section and section 73 shall apply to provident societies registered before the commencement of this Act under the Provident Insurance Societies Act, 1912, as if the reference to the calendar year were a reference to either the financial year or the calendar year.

**81. Actuarial report and abstract.**—(1) Every provident society shall once in every five years or at such shorter intervals as may be laid down by the rules of the society cause an investigation to be made into

its financial condition including the valuation of its liabilities and assets by an actuary.

(2) The report of the actuary shall contain an abstract in which shall be stated—

- (a) the general principles adopted in the valuation, including the method by which the valuation age of lives was ascertained,
- (b) the rate at each age of the mortality and any other factor assumed and the annuity values used in valuation,
- (c) the reserve values held against policies effected,
- (d) the rate of interest assumed, and
- (e) the provision made for expenses,

and shall have appended to it a certificate signed by a principal officer of the society that all material necessary for proper valuation has been placed at the disposal of the actuary and that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(3) If the actuary finds that the financial condition of the society is such that no surplus exists for distribution as bonus to the policyholders or as dividend to the shareholders, he shall state in his report whether in his opinion the society is insolvent and, if so, whether it should be wound up or not, and the extent to which in his opinion existing contracts should be modified or existing rates of premium should be adjusted to make good the deficiency in the assets.

## **82. Submission of returns to Superintendent of Insurance.—**

(1) The revenue account and balance-sheet with the auditor's report thereon and the report on the general state of the society's affairs referred to in sub-section (1) of section 80, and the statements referred to in sub-section (2) of section 80, shall be furnished as returns to the Superintendent of Insurance within three months from the end of the period to which they relate and copies of the revenue account and balance-sheet and the auditor's report thereon and of the report on the general state of the society's affairs shall, on the application of any member or policyholder made within two years from the date on which the document was so furnished, be sent to him within fourteen days from the receipt of the application on payment of a fee of one rupee.

(2) All the material necessary for the proper valuation of the liabilities of the society under the provisions of section 81 shall be placed at the disposal of the actuary within three months from the end of the period to which such material relates, and the report and abstract referred to in section 81 shall be furnished as a return to the Superintendent of Insurance within a further period of three months.

(3) The provisions of section 17 shall apply to the accounts and balance-sheet of a provident society being a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, as they apply to the accounts and balance-sheet of an insurer.

**83. Actuarial examination of schemes.—**(1) Every provident society, established after the commencement of this Act, shall cause every

scheme of insurance which it proposes to put into operation, and every provident society registered before the commencement of this Act under the provisions of the Provident Insurance Societies Act, 1912, shall cause any new scheme which it proposes to put into operation after such commencement to be examined by an actuary, and shall not receive any premium or contribution in connection with the scheme until the actuary has certified that the scheme is sound and such certificate has been forwarded to the Superintendent of Insurance.

(2) The provisions of sub-section (1) shall apply to any alteration of a scheme already in operation, but the Superintendent of Insurance may, if he is of opinion that the alteration unfairly affects the interests of existing policy-holders, prohibit the alteration, and, if he does so, the society shall not put the altered scheme into operation, unless it first discharges to the satisfaction of the Superintendent of Insurance all its liabilities to those of the existing policy-holders who dissent from the alteration.

(3) Every provident society registered before the commencement of this Act under the provisions of the Provident Insurance Societies Act, 1912, shall, as soon as may be and in any event before the expiry of six months from the commencement of this Act, submit all schemes of insurance which the society has in operation at the commencement of this Act to examination by an actuary and shall send the report of the actuary thereon to the Superintendent of Insurance.

(4) The report of the actuary shall state in respect of each scheme whether it is actuarially sound, and, where no actuarial report such as is referred to in section 81 has been made within the two years preceding the examination, the report shall also state whether the assets of the society are sufficient to meet its liabilities under the existing schemes, and, if not, how in the opinion of the actuary the existing contracts should be modified.

(5) If any scheme is reported by the actuary to be actuarially unsound, the Superintendent of Insurance shall give notice to the society prohibiting the operation of the scheme; and the society shall not receive any premium or contribution or effect any policy in connection with the scheme after the expiry of one month from the receipt of such notice.

(6) Where a scheme is discontinued under the provisions of sub-section (5) the society shall, where its assets are sufficient to meet all existing liabilities, set apart out of its assets the sum sufficient in the opinion of the actuary to meet the liabilities incurred under the scheme so discontinued, and, where its assets are not so sufficient, within three months from the date of the discontinuance, apply to the Court for a modification of its existing contracts or, failing such modification, for the winding up of the society.

**84. Separation of accounts and funds.**—Where a provident society effects policies of insurance in connection with more than one of the classes of contingency separately specified in section 65, the receipts and payments in respect of each such class shall be recorded in a separate account in the cash book kept in accordance with section 79.

**85. Investment of funds.**—(1) Every provident society shall, unless it already holds invested in Government securities or securities mentioned or referred to in clauses (c) and (d) of section 20 of the Indian

Trusts Act, 1882, not less than fifty per cent of the total assets of the society, invest all surplus assets in such securities until the total amount so invested amounts to not less than fifty per cent of the total assets of the society, and shall thereafter keep invested in such securities not less than fifty per cent of the total assets of the society.

(2) No funds or investments of a provident society except a deposit made under section 73 shall be kept otherwise than in the name of the society or in the name of a public officer approved by the Central Government.

(3) No loan shall be made out of the assets of a provident society to any director or officer of the society except on the security of a policy of insurance held in the society and within its surrender value and no such loan shall be made to any concern of which a director or officer of the society is a director or partner.

(4) Any director or officer of a society which contravenes the provisions of sub-section (3), who is knowingly a party to the contravention, shall without prejudice to any other penalty which he may incur be jointly and severally liable to the society for the amount of the loan, and such amount, together with interest from the date of the loan at such rate not exceeding twelve per cent per annum as the Superintendent of Insurance may fix, shall on application by the Superintendent of Insurance to any civil Court of competent jurisdiction be recoverable by execution as if a decree for such amount had been passed by that Court.

**86. Inspection of books.**—The books of every provident society shall at all reasonable times be open to inspection by the Superintendent of Insurance or any person appointed by him in this behalf or by any member or policy-holder of the society who has made an application in this behalf to the Superintendent of Insurance.

**87. Inquiry by or on behalf of Superintendent of Insurance.**—

(1) The Superintendent of Insurance shall at least once in two years and may, if he thinks fit, at any time visit personally or depute a suitable person to visit the principal office of a provident society and inquire into the solvency of the society and the manner in which the business of the society is conducted, or may, after giving notice to the society and giving it an opportunity to be heard, direct such an inquiry to be made by an auditor or actuary appointed by him.

(2) For the purposes of any such inquiry the Superintendent or the auditor or actuary, as the case may be, shall be entitled to examine all books and documents of the society and may demand from the society or any officer of the society such explanations as he may require on any matter relating to the affairs of the society.

(3) The results of any such inquiry shall be recorded in a report which shall be kept in the office of the Superintendent and a copy of the report shall be sent to the society concerned and shall be open to inspection by any member or policy-holder of the society.

**88. Winding up by Court and voluntary winding up.**—(1) The Court may order the winding up of a provident society being a company incorporated under the Indian Companies Act, 1913, and the provisions of that Act shall, subject to the provisions of this Part, apply accordingly.

(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of a provident society, if the registration of the society is cancelled by the Superintendent of Insurance under sub-section (4) of section 70 and he applies for the winding up of the society.

(3) A provident society being a company incorporated under the Indian Companies Act, 1913, may be wound up voluntarily in accordance with the provisions of that Act, but shall not be so wound up except for the purpose of effecting an amalgamation or re-construction of the society or on the ground that by reason of its liabilities it cannot continue its business.

(4) A provident society not being a company incorporated under the Indian Companies Act, 1913, may be wound up voluntarily under this Act if a resolution is passed by the proprietors that the society should be wound up voluntarily for the purpose or on the ground specified in sub-section (3), and the Superintendent of Insurance may, in any case where he has ordered the cancellation of the registration of a society under sub-section (4) of section 70, order the winding up of the society under this Act.

**89. Reduction of insurance contracts.**—The Court may make an order reducing the amount of the insurance contracts of a provident society upon such terms and subject to such conditions as the Court thinks just—

- (a) if the Superintendent of Insurance as an alternative to cancelling the registration of a society under sub-section (4) of section 70 applies to the Court in this behalf ;
- (b) if while a society is in liquidation the Court thinks fit ;
- (c) if when a society has been proved to be insolvent the Court thinks fit to do so in place of making an order for the winding up of the society ; or
- (d) if the Court is satisfied on an application made in this behalf by the society supported by the report of an actuary, and after giving the policy-holders an opportunity to be heard that it is desirable to do so.

**90. Appointment of liquidator.**—(1) Where a provident society is to be wound up whether under the Indian Companies Act, 1913, or under this Act, the society shall, within seven days from the date of the order of the Court ordering the winding up or the passing of the resolution authorising the winding up, as the case may be, give notice thereof to the Superintendent of Insurance, and, except where the winding up is done by an order of the Court, the Superintendent of Insurance shall appoint the liquidator and shall determine the remuneration to be paid to him.

(2) Any liquidator so appointed may be removed by the Superintendent of Insurance if satisfied that the duties entrusted to him are not being properly discharged.

**91. Powers of liquidator.**—(1) A liquidator appointed to wind up a society shall have power—

- (a) to institute or defend any legal proceedings on behalf of the society by his name of office ;

- (b) to determine the contribution to be made by members of the society respectively to the assets of the society ;
- (c) to investigate all claims against the society and to decide questions of priority arising between claimants ;
- (d) to determine by what persons and in what proportion the costs of the liquidation are to be borne ;
- (e) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society ;
- (f) to summon, and enforce the attendance of, witnesses and to compel the production of documents by the same means and as far as may be in the same manner as is provided in the case of a Civil Court by the Code of Civil Procedure, 1908 ; and
- (g) with the sanction of the Superintendent of Insurance, to employ such establishment and to obtain such assistance from an actuary or an auditor as may be necessary for the discharge of his duties.

(2) The liquidator shall, for settling the list of contributories and realising the amount of contributions, have the same powers as an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 1913.

**92. Procedure at liquidation.**—(1) As soon as a liquidator is appointed to wind up a society he shall take charge of all property movable or immovable of the society and of all its books and documents.

(2) If any proprietor or officer of the society or any other person retains any portion of the assets of the society or fails to deliver to the liquidator any book or document when so required by the liquidator, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and the Court may order the delivery of the assets or book or document to the liquidator.

(3) The liquidator shall within fifteen days of his appointment send notice by post to all persons who appear to him to be creditors of the society that a meeting of the creditors of the society will be held on a date not being less than twenty-one nor more than twenty-eight days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the local official Gazette and once at least in two newspapers circulating in the province in which the society is situated.

(4) At the meeting so held the creditors shall determine whether an application shall be made for the appointment of any person as liquidator in the place of or jointly with the liquidator already appointed, or for the appointment of a committee of inspection, and, if they so resolve and an application accordingly is made at any time not later than fourteen days after the date of the meeting by any creditor appointed for the purpose at the meeting, the Superintendent of Insurance shall appoint a suitable person in place of or jointly with the liquidator already appointed, and, if so desired, a committee of inspection.

(5) The committee of inspection shall, subject to any prescribed conditions, have a general power of supervision over the acts of the

liquidator and shall have the right to inspect his accounts at all reasonable times.

(6) The liquidator shall, with such assistance from an actuary as may be required, ascertain as soon as practicable the amount of the society's liability to every person appearing by the society's books to be entitled to or interested in any policy issued by the society, and shall give notice of the amount so found to each such person in the prescribed manner and each such person on receiving such notice shall be bound by the value so ascertained.

(7) The liquidator shall make a valuation of the assets of the society and an estimate of the costs of the winding up, and shall on the basis of these settle the list of contributories.

(8) The liquidator shall apply to the Superintendent of Insurance for an order for the return of the deposit made by the society under section 73 and the Superintendent of Insurance shall on such application order the return of the deposit subject to such terms and conditions as he may think fit.

(9) In administering and distributing the assets of the society the liquidator shall have regard to any directions that may be given by the creditors or contributories at a general meeting or by the Superintendent of Insurance.

(10) The liquidator shall keep books of account in which he shall record the proceedings at all meetings attended by him, all amounts received or expended by him and any other matter that may be prescribed, and these books may, with the sanction of the Superintendent of Insurance, be inspected by any creditor or contributory.

(11) If the winding up continues for more than a year, the liquidator shall summon a meeting of the creditors and contributories at the end of the first year and of each succeeding year, and shall lay before them an account of his acts and dealings and of the conduct of the winding up, and that account together with any views expressed thereon by the meeting shall be forwarded by the liquidator to the Superintendent of Insurance.

(12) So far as is not otherwise provided herein or is not otherwise prescribed under this Act, the liquidator shall so far as practicable follow the procedure to be followed by an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 1913.

**93. Dissolution of provident society.**—(1) As soon as the affairs of a provident society are fully wound up the liquidator shall prepare an account of the winding up showing how the winding up has been conducted and the property of the society has been disposed of and shall call a meeting of the members, creditors and contributories for the purpose of laying before it the account and giving any explanation thereof.

(2) Notice of the meeting shall be sent to each person individually and shall be advertised in the local official Gazette and in at least two newspapers circulating in the province in which the society is situated.

(3) Within one week after the meeting the liquidator shall send to the Superintendent of Insurance a copy of the account and shall

report to him the holding of the meeting and its date and shall forward to him a copy of the proceedings of the meeting.

(4) The Superintendent of Insurance may return the account to the liquidator if it is incomplete or unsatisfactory and may require the liquidator to carry out any further steps necessary to complete the winding up and the liquidator shall comply with such requirement and shall submit a further report to the Superintendent of Insurance within six months.

(5) If the Superintendent of Insurance is satisfied that the affairs of the society have been fully wound up he shall register the account of the liquidator who shall forthwith make over to the Superintendent of Insurance sums, if any, remaining undisposed of; and on the expiry of three months from the registering of the account the Superintendent of Insurance shall declare the society dissolved and cause the dissolution of the society to be notified in the local official Gazette, and the liquidator shall thereupon be discharged from further responsibility.

(6) If within a period of five years from the date on which any sums have been made over to the Superintendent of Insurance under sub-section (5) an order of a Court of competent jurisdiction has not been obtained at the instance of any claimant to such sums for their disposal, the said sums shall become the property of Government.

**94. Nominations and assignments.**—(1) The provisions of section 38 and section 39 relating to assignment, transfer and nomination in the case of life insurance policies shall, subject to the provisions of this section, apply to policies of insurance issued by any provident society covering any of the contingencies specified in clause (a) of section 65.

(2) No nomination shall be valid if the person nominated is not the husband, wife, father, mother, child, grandchild, brother, sister, nephew or niece of the holder of the policy.

## PART IV.

### MUTUAL INSURANCE COMPANIES AND CO-OPERATIVE LIFE INSURANCE SOCIETIES.

**95. Definitions.**—(1) In this Part—

- (a) "Mutual Insurance Company" means an insurer, being a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, which has no share capital and of which by its constitution only and all policy-holders are members; and
- (b) "Co-operative Life Insurance Society" means an insurer being a society registered under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members on

whose application the society is registered and all policy-holders are members :

Provided that any Co-operative Life Insurance Society in existence at the commencement of this Act shall be allowed a period of one year to comply with the provisions of this Act.

(2) Notwithstanding anything contained in sub-section (1), other co-operative societies may be admitted as members of a Co-operative Life Insurance Society, without being eligible to any dividend, profit or bonus.

(3) A Provincial Government may, subject to any rules made by the Central Government, empower the Registrar of Co-operative Societies of the province to register co-operative societies for the insurance of cattle or crops or both under the provisions of the Co-operative Societies Act in force in the province.

(4) A Provincial Government may make rules not inconsistent with any rules made by the Central Government to govern such societies, and the provisions of this Act, in so far as they are inconsistent with those rules, shall not apply to such societies.

**96. Application of Act to Mutual Insurance Companies and Co-operative Life Insurance Societies.**—The provisions of sections 6 and 7 and of sub-section (2) of section 20, so far as those provisions are inconsistent with the provisions of this Part, shall not apply, and the provisions of this Part shall apply to Mutual Insurance Companies and Co-operative Life Insurance Societies.

**97. Working capital of Mutual Insurance Companies and Co-operative Life Insurance Societies.**—No Mutual Insurance Company incorporated after the 26th day of January, 1937, and no Co-operative Life Insurance Society registered after that date under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies shall be registered under this Act, unless it has as working capital a sum of fifteen thousand rupees, exclusive of the deposit to be made before or at the time of application for registration in accordance with sub-section (2) of section 98 of this Act and of the preliminary expenses, if any, incurred in the formation of the company or society.

**98. Deposits to be made by Mutual Insurance Companies and Co-operative Life Insurance Societies.**—(1) Every Mutual Insurance Company and every Co-operative Life Insurance Society shall, in respect of the life insurance business carried on by it in British India, deposit and keep deposited with one of the offices in India of the Reserve Bank of India, for and on behalf of the Central Government, a sum of two hundred thousand rupees in cash or in approved securities estimated at the market value of the securities on the day of deposit.

(2) The deposit referred to in sub-section (1) may be made in instalments, of which the first shall be a payment, made before or at the time the application for registration under this Act is made, of twenty-five thousand rupees or such sum as with any deposit previously made by the insurer under the provisions of the Indian Life Assurance Companies Act, 1912, brings the amount deposited up to twenty-five thousand rupees, and the subsequent instalments shall be annual

instalments made before the expiry of each subsequent calendar year of an amount in cash or in approved securities estimated at the market value of the securities on the day of payment of the instalment, equal to one-third of the gross premium income received in the previous calendar year.

**99. Transferees and assignees of policies not to become members.**—No transferee or assignee of a policy issued by an insurer to whom this Part applies shall become a member of a Mutual Insurance Company or a Co-operative Life Insurance Society merely by reason of any such transfer or assignment.

**100. Publication of notices and documents of Mutual Insurance Companies and Co-operative Life Insurance Societies.**—Notwithstanding the provisions of section 79 and section 131 of the Indian Companies Act, 1913, a Mutual Insurance Company or a Co-operative Life Insurance Society may, instead of sending the notices and the copies of the balance-sheet, revenue account and other documents which they are required to send to the members under those sections, publish such notices or documents once in a newspaper published in the English language and in a newspaper published in an Indian language circulating in the place where the principal office of the company is situated :

Provided that, where any members of the company are domiciled in a province other than that in which the principal office of the company is situated, publication of the balance-sheet, revenue account and notice of the meetings shall be made in a newspaper or newspapers published in the principal languages of that province and circulating therein.

**101. Supply of documents to members.**—Every Mutual Insurance Company and every Co-operative Life Insurance Society shall, on the application of any member made within two years from the date on which any such document is furnished to the Registrar of Companies under the provisions of section 134 of the Indian Companies Act, 1913, or to the Registrar of Co-operative Societies of the province in which the Co-operative Life Insurance Society is registered, furnish a copy of the document free of cost to the member within fourteen days of the application.

## PART V.

### MISCELLANEOUS.

**102. Penalty for default in complying with, or act in contravention of, this Act.**—(1) Except as otherwise provided in this Act, any insurer who makes default in complying with or acts in contravention of any requirement of this Act and, where the insurer is a company, any director, managing agent, manager or other officer of the company, or where the insurer is a firm, any partner of the firm who is knowingly a party to the default, shall be punishable with fine which may extend to one thousand rupees and, in the case of a continuing default, with an additional fine which may extend to five hundred rupees for every day during which the default continues.

(2) Any provident society which makes default in complying with any of the requirements of Part III and any director, managing agent, manager, secretary or other officer of the society who is knowingly a

party to the default, shall be punishable with fine which may extend to five hundred rupees or in the case of a continuing default with fine which may extend to two hundred and fifty rupees for every day during which the default continues.

**103. Penalty for transacting insurance business in contravention of sections 3, 6, 7, 97 and 98.**—(1) Any insurer or any person acting on behalf of an insurer, who transacts any class of insurance business in contravention of any of the provisions of section 3, section 6, section 7, section 97 or section 98, or does any one or more of the acts constituting the business of insurance in relation to any insurance business transacted in contravention of any of the said sections, shall be punishable with fine which may extend to two thousand rupees.

(2) Any person knowingly taking out a policy of insurance with any insurer or person guilty of an offence under sub-section (1) shall be punishable with fine which may extend to five hundred rupees :

Provided that nothing in this section shall apply to the business of re-insurance between the head office of an insurer in British India and the head office of an insurer not having an office in British India.

**104. Penalty for false statement in document.**—Whoever, in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to one thousand rupees, or with both.

**105. Wrongfully obtaining or withholding property.**—Any director, managing agent, manager or other officer or employee of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or authorised by this Act shall, on the complaint of the insurer or any member or any policy-holder thereof, be punishable with fine which may extend to one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully mis-applied and in default to suffer imprisonment for a period not exceeding two years.

**106. Wrongfully diminishing life insurance fund.**—If on the application of an insurer or any member of an insurance company or any policy-holder or the liquidator of an insurance company (in the event of the insurer being in liquidation) the Court is satisfied that by reason of any contravention of the provisions of this Act the amount of the life insurance fund has been diminished, every person who was at the time of the contravention a director, manager, liquidator or an officer of the insurer shall be deemed in respect of the contravention to have been guilty of misfeasance in relation to the insurer unless he proves that the contravention occurred without his consent or connivance and was not facilitated by any neglect or omission on his part ; and the Court shall have all the powers which a Court has under sections 235 and 237 of the Indian Companies Act, 1913, and shall also have the power to assess the sum by which the amount of the life insurance fund

has been diminished by reason of the misfeasance and to order any person guilty thereof to contribute to that fund the whole or any part of that sum by way of compensation.

**107. Previous sanction of Advocate General for institution of proceedings.**—Except where proceedings are instituted by the Superintendent of Insurance, no proceedings under this Act against an insurer or any director, manager or other officer of an insurer or any person who is liable under sub-section (2) of section 41 shall be instituted by any person unless he has previous thereto obtained the sanction of the Advocate General of the province where the principal place of business in British India of such insurer is situate to the institution of such proceedings.

**108. Power of Court to grant relief.**—If in any proceedings, civil or criminal, it appears to the Court hearing the case that a person is or may be liable in respect of negligence, default, breach of duty or breach of trust but that he has acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him either wholly or partly from his liability on such terms as it may think fit.

**109. Cognizance of offences.**—No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

**110. Appeals.**—(1) An appeal shall lie to the Court having jurisdiction from any of the following orders, namely:—

- (a) an order under section 3 refusing to register, or cancelling the registration of, an insurer;
- (b) an order under section 5 directing the insurer to change his name;
- (c) an order under section 42 cancelling the licence issued to an agent;
- (d) an order under section 75 refusing to register an amendment of rules;
- (e) an order under section 87 directing an inquiry by an auditor or actuary; or
- (f) an order made in the course of the winding up or insolvency of an insurer or a provident society.

(2) The Court having jurisdiction for the purposes of sub-section (1) shall be the principal Court of civil jurisdiction within whose local limits the principal place of business of the insurer concerned is situate.

(3) An appeal shall lie from any order made under sub-section (1) to the authority authorized to hear appeals from the decisions of the Court making the same and the decision on such appeal shall be final.

**111. Service of notices.**—(1) Any process or notice required to be served on an insurer or provident society shall be sufficiently served if addressed to any person registered with the Superintendent of Insurance as a person authorized to accept notices on behalf of the insurer or provident society and left at, or sent by registered post to, the address of such person as registered with the Superintendent of Insurance.

(2) Any notice or other document which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy are usually sent and any notice so addressed and sent shall be deemed to be notice to the holder of such policy :

Provided that, where any person claiming to be interested in a policy as transferee, assignee or nominee has given to an insurer or to a provident society notice in writing of his interest, any notice which is by this Act required to be sent to policy-holders shall also be sent to such person at the address specified by him in his notice.

**112. Declaration of interim bonuses.**—Notwithstanding anything to the contrary contained in this Act an insurer carrying on the business of life insurance shall be at liberty to declare an *interim* bonus or bonuses to policy-holders whose policies mature for payment by reason of death or otherwise during the inter-valuation period on the recommendation of the investigating actuary made at the last preceding valuation.

**113. Acquisition of surrender values by policy.**—(1) Where a definite number of premiums is payable a policy of life insurance on which all premiums have been paid for three consecutive years shall acquire a guaranteed surrender value and notwithstanding any contract to the contrary shall not lapse by reason of non-payment of further premium but shall notwithstanding such non-payment be kept alive to the extent of its paid up value.

*Explanation.*—For the purposes of this sub-section the paid up value of a policy shall be an amount bearing to the total sum assured by the policy the same proportion as the total of the premiums already paid on the policy bears to the total of the premiums payable under the policy.

(2) A policy kept alive to the extent of its paid up value under sub-section (1) shall not participate in any profits of the insurer earned after the conversion of the policy into a paid up policy.

(3) This section shall not apply to—

- (a) policies in respect of which the sum assured is payable only on the happening of a contingency which may not arise, or
- (b) where the paid up value will be less than one hundred rupees, or
- (c) where the parties after the default has occurred in the payment of the premium agree in writing to some other arrangement, or
- (d) to policies in which the surrender value is automatically applied under the terms of the contract to maintaining the policy in force after its lapse through non-payment of premium.

**114. Power of Central Government to make rules.**—(1) The Central Government may, subject to the condition of previous publication by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

- (a) the qualifications to be possessed by actuaries ;
- (b) the manner in which it shall be determined for the purposes of this Act what is insurance business transacted in British India ;
- (c) the procedure to be followed by the Reserve Bank of India in dealing with deposits made in pursuance of this Act, including the receipt of, custody of, withdrawal of, and payment of interest on securities lodged as such deposits, and their inspection and verification by the Superintendent of Insurance ;
- (d) the form referred to in clause (d) of sub-section (2) of section 16 ;
- (e) the manner in which the prospectuses and tables referred to in sub-section (1) of section 41 shall be published and the form in which they shall be drawn up ;
- (f) the matters to be prescribed for the purposes of section 48 ;
- (g) the manner in which licences to act as insurance agents may be issued or cancelled ;
- (h) the contingencies other than those specified in clauses (a) to (f) of section 65 on the happening of which money may be paid by provident societies ;
- (i) the matters other than those specified in clauses (a) to (g) of sub-section (1) of section 74 on which a provident society shall make rules ;
- (j) the form of any account, return or register required by Part III and the manner in which such account, return or register shall be verified ;
- (k) subject to the provisions of this Act, the fees payable thereunder and the manner in which they are to be collected ; and
- (l) the conditions and the matters which may be prescribed under sub-sections (5), (6), (10) and (12) of section 92 :

Provided that every rule made under this section shall be laid as soon as may be after it is made before both Chambers of the Central Legislature for one month while they are in session ; and, if within one month from the later date on which the rule has so been laid both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such a modified form or shall be of no effect, as the case may be.

(3) All rules made by a Local Government under the provisions of section 24 of the Provident Insurance Societies Act, 1912, and in force at the commencement of this Act shall so far as not inconsistent with the provisions of Part III continue in force and have effect as if duly made under this section until they are replaced by rules made under this section.

115. *Alteration of forms.*—The Central Government may, on the application or with the consent of an insurer, not being a company,

alter the forms contained in the Schedules as respects that insurer, for the purpose of adapting them to the circumstances of that insurer :

Provided that nothing done under this section shall exempt the insurer from supplying all information required under this Act so far as it is possible for the insurer to do so.

**116. Power to exempt from certain requirements.**—The Central Government may, by notification in the official Gazette, exempt any insurer constituted, incorporated or domiciled in an Indian State from the provisions of section 7 or section 98 relating to deposits or from the provisions of sub-section (2) of section 27 relating to the keeping of assets in India either absolutely or subject to such conditions or modifications as may be specified in the notification.

**117. Saving of provisions of Indian Companies Act, 1913.**—Nothing in this Act shall affect the liability of an insurer being a company to comply with the provisions of the Indian Companies Act, 1913, in matters not otherwise specifically provided for by this Act.

**118. Exemptions.**—Nothing in this Act shall apply to any Trade Union registered under the Indian Trade Unions Act, 1926, or to any insurance business carried on by the Central or by a Provincial Government, or to any provident fund to which the provisions of the Provident Funds Act, 1925, apply, or, if the Superintendent of Insurance so orders in any case, and to such extent as he specifies in such order, to—

- (a) any fund in existence and officially recognised by the Central Government before the 27th day of January, 1937, maintained by or on behalf of Government servants or Government pensioners for the mutual benefit of contributors to the fund and of their dependents, or
- (b) any mutual or provident insurance society composed wholly of Government servants or of railway servants which has been exempted from any or all of the provisions of the Provident Insurance Societies Act, 1912.

**119. Policy forms to be deposited with the Superintendent of Insurance.**—Every insurer registered under this Act shall deposit and keep deposited with the Superintendent of Insurance copies of all standard forms of policy contracts issued by him in India.

**120. Determination of market value of securities deposited under this Act.**—The market value on the day of deposit of securities deposited in pursuance of any of the provisions of this Act with the Reserve Bank of India shall be determined by the Reserve Bank of India whose decision shall be final.

**121. Amendment of section 130, Act IV of 1882.**—To the *Exception* to section 130 of the Transfer of Property Act, 1882, the following words and figures shall be added, namely :—

“ or affects the provisions of section 38 of the Insurance Act, 1938.”

[122. *Repealed.*]

123. **Repeals.**—The Provident Insurance Societies Act, 1912, the Indian Life Assurance Companies Act, 1912, and the Indian Insurance Companies Act, 1928, are hereby repealed.

### THE FIRST SCHEDULE.

(See section 11.)

#### *Regulations and Forms for the preparation of Balance-Sheet.*

#### PART I.

##### *Regulations.*

1. The balance-sheet required to be prepared in respect of every class of business carried on by an insurer is, in the form in which it is set out in Part II of this Schedule (Form A), appropriate to a case where the insurer maintains a separate fund in respect of life insurance business.

2. The balance-sheet of life insurance business shall be prepared as a separate document. The balance-sheet of any class of business may be prepared as a separate document instead of being incorporated by the addition of columns and headings in the general balance-sheet, but the totals of each such separate balance-sheet (showing the total assets of the class of business, the balance at the credit of the life insurance fund or other separate fund or account, the amount of shareholders' undivided profits, and outstanding liabilities) must in any case be incorporated in the general balance-sheet.

3. If any combined balance-sheet is for any purpose issued by an insurer, it shall be in accordance with the Form set out in this Schedule, and there shall not be included among the assets shown in any such combined balance-sheet any amount in respect of any holding in or advance to any insurer whose assets and liabilities have been incorporated therein. Every combined balance-sheet must show clearly on the face thereof that it is a combined balance-sheet and must set out fully the name of every insurer whose assets and liabilities have been incorporated therein; if the assets and liabilities of any person not being an insurer are included in a combined balance-sheet the fact must be stated thereon.

4. Where any guarantee has been given by an insurer (otherwise than in the ordinary course of re-insurance business) in respect of the policies of any other insurer, the balance-sheet of the insurer by whom the guarantee was given must show clearly the name of every insurer whose policies have been so guaranteed and the extent of the guarantee:

Provided that this regulation shall not apply where a combined balance-sheet is issued incorporating the assets and liabilities of the insurer whose policies are guaranteed.

5. Where any part of the assets of an insurer is deposited in any place outside British India as security for the owners of policies issued in that place, the balance-sheet shall state that part of the assets has been so deposited, and, if any such part forms part of the life insurance fund, shall show the amount thereof and the place where it is deposited. Where any combined balance-sheet is issued by an insurer for any purpose, the information required by this regulation shall be shown

in the aggregate in respect of all the insurers whose assets and liabilities have been incorporated in the balance-sheet.

6. There shall be appended to the balance-sheet a statement in Form AA as set out in Part II of this Schedule showing the market value and the book value of the assets in India.

7. Every balance-sheet shall contain the following certificates, namely :—

- (a) a certificate signed by the same persons as are required by this Act to sign the balance-sheet explaining how the values as shown in the balance-sheet of the Investments in Stocks and Shares have been arrived at, and how the market value thereof has been ascertained for the purpose of comparison with the values so shown ;
- (b) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and signed also, so far as respects the value of any items shown in the balance-sheet under the heading of "Reversions and Life Interests", by an actuary, certifying that the values of all the assets have been reviewed as at the date of the balance-sheet, and that in their belief the assets set forth in the balance-sheet are shown in the aggregate at amounts not exceeding their realisable or market value under the several headings—  
"Loans", "Reversion and Life Interests", "Investments", "Agent's Balances", "Outstanding Premiums", "Interest, Dividends and Rents outstanding", "Interest, Dividends and Rents accruing but not due", "Amounts due from other Persons or Bodies carrying on Insurance Business", "Sundry Debtors", "Bills Receivable", "Cash" and the several items specified under "Other Accounts" :

Provided that if the persons signing the certificate are unable to certify that the assets set forth in the balance-sheet are so shown as aforesaid, a full explanation of the bases upon which the values shown in the balance-sheet have been assessed shall be given in the certificate ;

- (c) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and by the auditor certifying that no parts of the assets of the life insurance fund has been directly or indirectly applied in contravention of the provisions of this Act relating to the application and investment of life insurance funds ; and
- (d) certificates signed by the auditor (which shall be in addition to any other certificate or report which he is required by law to give with respect to the balance-sheet) certifying—
  - (i) that he has verified the cash balances and the securities relating to the insurer's loans, reversions and life interests, and investments ;
  - (ii) to what extent, if any, he has verified the investments and transactions relating to any trusts undertaken by the insurer as trustee ; and
  - (iii) in the case of a combined balance-sheet, that he has audited the balance-sheet and accounts of every insurer whose assets and liabilities are incorporated therein, or that any such balance-sheet and accounts which have not been audited by him have been certified by

independent auditors. The said certificate shall contain a reference to such reservations, if any, as may have been made by any auditor upon any report or certificate given by him with respect to the balance-sheet and accounts of any insurer whose assets and liabilities are incorporated in the combined balance-sheet.

8. If the values shown in the balance-sheet in respect of "Holdings in Subsidiary Companies" or "House property (i) in India (ii) out of India" have been increased since the last previous balance-sheet, the certificate required by paragraph (b) of the last foregoing regulation shall state the amount of every increase not solely due to the cost of subsequent additions or, as respects holdings in controlled companies, to increased profits, and shall contain an explanation of the reason therefor.

9. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely :—

- (a) "combined balance-sheet" includes any combined statement made by an insurer of assets and liabilities in the form of a balance-sheet which includes the assets and liabilities of any other insurer ; and
- (b) "market value" means as respects any asset the market value thereof as ascertained from published market quotations, or, if there be no such value, its fair value as between a willing buyer and a willing seller.

PART II.—FORMS.

FORM A.—Form of Balance-Sheet.

Balance-Sheet of 19 .

	Life & Annuity Business (1)	Other Classes of Business (2)*	Total		Life & Annuity Business (1)	Other Classes of Business (2)*	Total
	Rs. A. P.	Rs. A. P.	Rs. A. P.		Rs. A. P.	Rs. A. P.	Rs. A. P.
—				—			
Shareholders' Capital (each class to be stated separately) ..				Loans :			
Authorized :				On Mortgages of property within British India ..			
.....Shares of Rs.....each Rs.				On Mortgages of property outside British India ..			
Subscribed :				On Security of municipal and other public rates ..			
.....Shares of Rs.....each Rs.				On Stocks and Shares ..			
Called up :				On Insurer's policies within their surrender value ..			
.....Shares of Rs.....each Rs.				On Personal security ..			
Loss Unpaid calls				To subsidiary Companies (other than Reversionary) (f) ..			
Reserve or Contingency Accounts (a) :				Reversions and Life Interests : ..			
Investment Reserve Account ..				Loans on Reversions and Life Interests ..			
Profit and Loss Appropriation Account Balance ..				Debentures and Debenture Stocks of Subsidiary Reversionary Companies (f) ..			
Balances of Funds and Accounts :				Ordinary Stocks and Shares of Subsidiary Reversionary Companies (f) ..			
Life Insurance Fund ..				Loans to Subsidiary Reversionary Companies (f) ..			
Fire Insurance Business Account ..							
Marine Insurance Business Account ..							
Carried over ..				Carried over ..			

## FORM A—Contd.

	Life & Annuity Business (1)	Other Classes of Business (2)	Total	Life & Annuity Business (1)	Other Classes of Business (2)	Total
	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.
—						
Brought forward ..						
Investments :						
Deposit with the Reserve Bank of India (Securities to be specified) ..						
Indian Government Securities ..						
Provincial Government Securities ..						
British, British Colonial and British Dominion Government Securities ..						
Foreign Government Securities ..						
Indian Municipal Securities ..						
British and Colonial Securities ..						
Foreign Securities ..						
Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the Indian Government or a Provincial Government ..						
Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the British or any Colonial Government ..						
Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by any Foreign Government ..						
Debentures of any railway in India ..						
Debentures of any railway out of India ..						
Preference or guaranteed Shares of any railway in India ..						
Preference or guaranteed Shares of any railway out of India ..						
Accident and Miscellaneous Insurance Business Account ..						
Other accounts, if any (to be specified) (1) ..						
Pension or Superannuation Accounts (2) ..						
Debenture Stock per cent ..						
Loans and advances (c) ..						
Bills payable (c) ..						
Estimated Liability in respect of outstanding claims, whether due or intimated (d) ..						
Annuities due and unpaid (e) ..						
Outstanding Dividends ..						
Amounts due to Other Persons or Bodies carrying on Insurance Business (c) ..						
Sundry Creditors (including outstanding and accruing expenses and taxes) (c) ..						
Other sums owing by the Insurer (particulars to be given) (c) ..						
Outstanding Liabilities (to be specified) (c) ..						
Rs.						

Railway Ordinary Stocks (i) in India	
(ii) out of India .. .. .	
Other Debentures and Debenture Stock	
of Companies incorporated (i) in India	
(ii) out of India .. .. .	
Other guaranteed and Preference Stocks	
and Shares of Companies incorporated	
(i) in India (ii) out of India .. .. .	
Other Ordinary Stocks and Shares of	
Companies incorporated (i) in India	
(ii) out of India .. .. .	
Holdings in Subsidiary Companies (f) .. .. .	
House Property (i) in India (ii) out of	
India .. .. .	
Freehold and Leasehold ground rents	
and rent charges .. .. .	
Agent's Balances .. .. .	
Outstanding premiums (g) .. .. .	
Interest, Dividends and Rents out-	
standing (d) .. .. .	
Interest, Dividends and Rents accruing	
but not due (d) .. .. .	
Amounts due from other persons or Bodies	
carrying on Insurance Business (h) .. .. .	
Sundry Debtors (i) .. .. .	
Bills Receivable .. .. .	
Cash : .. .. .	
At Bankers on Deposit Account .. .. .	
At Bankers on Current A/c and in hand	
At Call and Short Notice (j) .. .. .	
Other Accounts to be specified (k) .. .. .	

## Notes.

(2). \* Assets and Liabilities, Shareholders' Capital and Reserves, not allocated to any class of business specified in column (1) must be shown in column

(e) The Reserves or Contingency Accounts must be separately stated.

(b) If the insurer has not full and unrestricted control of the assets constituting the Pension or Superannuation Accounts, either those Accounts and the assets and liabilities relating thereto must be omitted from the balance-sheet of the assets of which the insurer has not such control must be clearly indicated on the face of the balance-sheet.

- (c) If the insurer has deposited security as cover in respect of any of these items, the amount and nature of the securities so deposited must be clearly indicated on the face of the balance-sheet.
- (d) These items are or have been included in the corresponding items in the Revenue or Profit and Loss Account. Outstanding and accruing interest, dividends and rents must be shown after deduction of income-tax or the income-tax must be provided for amongst the liabilities on the other side of the balance-sheet.
- (e) Such items as amount of liability in respect of bills discounted, uncalled capital of subsidiary companies, uncalled capital of other investments, etc., must either be shown in their several categories under the heading "Contingent Liabilities" or the appropriate items on the assets side must be set out in such detail as will clearly indicate the amount of the uncalled capital.
- (f) As respects life and annuity businesses full particulars of holdings in and loans to subsidiary companies must be stated, giving the name of each company, the number and description of each class of shares held, the amounts paid up thereon, and the value at which the holdings in each company stand in the balance-sheet.
- (g) Either this item must be shown net of the commission must be provided for amongst the liabilities on the other side of the balance-sheet.
- (h) The aggregate amount owing by a subsidiary company or subsidiary companies is to be shown separately from all other assets and the aggregate amount owing to a subsidiary company or subsidiary companies is to be shown separately from all other liabilities.
- (i) Amounts due from directors and officers must be shown separately.
- (j) No amounts must be entered under this heading unless fully secured. If not fully secured, the amounts must be included under the heading "Sundry Debtors".
- (k) Under this heading must be included such items as the following, which must be shown under separate headings suitably described: office furniture, goodwill, preliminary, formation and organisation expenses, development expenditure account, discount on debentures issued, other expenditure carried forward to be written off in future years, balance being loss on Profit and Loss Appropriation Accounts, etc. The amounts included in the balance-sheet must not be in excess of cost.
- (l) Under the head "Other accounts, if any (to be specified)" on the left hand side, fines realised from the staff and their contribution towards the provident fund, if any, should be shown under separate sub-heads.

**FORM AA.**

**Classified Summary of the Assets in India of the.....Company on 19 .**

Class of Asset.	Book value as per (a) below.	Market- value as per (b) below.	Remarks as per (c) below.
	Rs.	Rs.	
(1) Government of India Securities ..			
(2) Indian Provincial Govt. Securities ..			
(3) Indian Municipal Port and Improve- ment Trust Securities including De- bentures .. ..			
(4) Debentures of Indian Railways ..			
(5) Guaranteed and Preference Shares of Indian Railways .. ..			
(6) Annuities of Indian Railways ..			
(7) Ordinary Shares of Railways in India..			
(8) Other Debentures of concerns in India			
(9) Other Guaranteed and Preference Shares of concerns in India .. ..			
(10) Other Ordinary Shares of concerns in India .. ..			
(11) Loans on the Company's policies effected in India and within their surrender value .. ..			
(12) Loans on Mortgage of Property in India			
(13) Loans on Personal Security to persons domiciled and resident in India ..			
(14) Other Loans granted in India (particu- lars to be stated) .. ..			
(15) Land and House Property in India ..			
(16) Cash on Deposit in banks in India ..			
(17) Cash in Hand and on current account in banks in India .. ..			
(18) Agents' balances and outstanding premiums .. ..			
(19) Interest, dividends and rents either outstanding or accrued but not due			
(20) Other assets in India (to be specified)..			

The statement shall show—

- the value for which credit is taken in the balance-sheet for each of the above-mentioned classes of assets,
- the market value of such of the above-mentioned classes of assets as has been ascertained from published quotations after deduction of accrued interest included in market prices in those cases where accrued interest is included elsewhere in the balance-sheet,
- how the value of such of the above-mentioned classes of assets as has not been ascertained from published quotations has been arrived at, and
- the rates of exchange at which the values of the assets other than in rupee currency have been converted into rupees.

The market values need not be shown separately where they are not less than the book values and a certificate to that effect is appended to the statement.

No amounts on account of any of the following items may be entered in the statement :—

Goodwill.

Preliminary, formation, organisation or development expenses.

Commission or discount on shares or debentures issued.

Commuted Commission.

Expenditure carried forward to be written off in future year.

## THE SECOND SCHEDULE.

(See section 11.)

*Regulations and Forms for the preparation of Profit and Loss Accounts.*

## PART I.

*Regulations.*

1. The items on the income side of the Profit and Loss Account and Profit and Loss Appropriation Account must relate to income, whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

2. Deductions from Interest, Dividends and Rents to be shown in respect of income-tax must include all amounts in respect of British Indian income-tax whether or not it has been or is to be deducted at source or paid direct.

3. The Interest, Dividends and Rents, *less* income-tax thereon, shown in the Revenue Accounts for any classes of business other than life insurance business, including annuity business may, if the insurer so desires, be included with the corresponding items in the Profit and Loss Account.

**PART II.—FORMS.**

**FORM B.**

*Form of Profit and Loss Account.*

Profit and Loss Account of                      for the year ended                      19

	Rs. A. P.		Rs. A. P.
British Indian Taxes on the Insurer's Profits (not applicable to any particular Fund or Account) .. ..		Interest, Dividends and Rents (not applicable to any particular Fund or Account) Rs.	
		Less—Income-tax thereon Rs.	
Expenses of Management (not applicable to any particular Fund or Account)* .. ..		Profit on realisation of Investments (not credited to Reserves or any particular Fund or Account) .. ..	
Loss on Realisation of Investments (not charged to Reserves or any particular Fund or Account) .. ..		Appreciation of Investments (not credited to Reserves or any particular Fund or Account) .. ..	
Depreciation of Investments (not charged to Reserves or any particular Fund or Account) .. ..		Profit transferred from Revenue Accounts (details to be given) .. ..	
Loss transferred from Revenue Accounts (details to be given) .. ..		Transfer Fees .. ..	
Other Expenditure (to be specified) .. ..		Other Income (to be specified) .. ..	
Balance for the year carried to Appropriation Account .. ..		Balance being loss for the year carried to Appropriation Account .. ..	

\* If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount must be shown separately.

## FORM C.

*Form of Profit and Loss Appropriation Account.*

Profit and Loss Appropriation Account of      for the year ended 19 .

	Rs. A. P.		Rs. A. P.
Balance being loss brought forward from last year ..		Balance brought forward from last year ..	Rs.
Balance being loss for the year brought from Profit and Loss Account (as in Form B) ..		Less—Dividends since paid in respect of last year (to be specified and if "free of tax" to be so stated)* ..	Rs.
Dividends paid during the year on account of the current year (to be specified and if "free of tax" to be so stated)			
Transfers to any Particular Funds or Accounts (details to be given) ..		Balance for the year brought from Profit and Loss Account (as in Form B) ..	
Balance at end of the year as shown in the Balance-Sheet		Balance being loss at end of the year as shown in the Balance-Sheet ..	

\*Note.—This item may be shown on the other side of the account if preferred.

**THE THIRD SCHEDULE.**

(See section 11.)

*Regulations and Forms for the preparation of Revenue Accounts.*

**PART I.**

*Regulations.*

1. Form D is, as set out in Part II of this Schedule, appropriate for life insurance business, but a separate revenue account must be prepared for every class of business in respect of which the insurer is required to maintain a separate account.

2. Form F is, as set out in Part II of this Schedule, appropriate for fire insurance business. A separate revenue account in the same form must be prepared for accident and miscellaneous insurance including workmen's compensation and motor car insurance. Form E is, as set out in Part II of this Schedule, appropriate for marine insurance business.

3. If any combined revenue account is for any purpose issued by an insurer it must be in accordance with the forms specified in this Schedule and must clearly show on the face thereof that it is a combined revenue account, and must set out fully the name of every insurer required to make separate returns under this Act whose revenue and expenditure have been included therein; if the revenue and expenditure of any person not being an insurer are included in a combined revenue account, the fact must be stated thereon.

4. The items on the income side of the revenue account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

5. Re-insurance premiums, whether on business ceded or accepted, are to be brought into account gross (i.e., before deducting commissions) under the head of premiums.

6. As respects life insurance business the following statements shall be furnished to the Superintendent of Insurance every year showing details provided for in a Form pertaining thereto :—

- (A) A statement in form DD as set forth in Part II of this Schedule.
- (B) A statement in form DDD as set forth in Part II of this Schedule.
- (C) A statement in form DDDD as set forth in Part II of this Schedule.

7. The following information shall be supplied in addition to the revenue account, namely, the gross premium written in India for life, fire, marine and accident and miscellaneous insurance business.

8. Any office premises which form part of the assets of a life insurance fund must be treated as an interest earning investment, and accordingly, in the revenue account for life insurance business a fair rent for the premises must be included under the heading "Interest, Dividends and Rents" and in the Revenue Account for every class of business for which the premises are used proper charges for the use thereof must be included under the heading "Expenses of Management".

9. Where an insurer carries on the business of life insurance in conjunction with any other class of insurance business the expenses of management charged to the life insurance revenue account must not include more than a reasonable proportion of the common expenses and in particular, no such account must be charged with more than a fair sum for the use of any office premises having regard to the income from the various classes of business carried on and to the extent to which the premises are used for the purposes of each class of business.

10. Deductions from Interest, Dividends and Rents in respect of income-tax must include all income-tax charged on such income whether or not it has been or is to be deducted at source or paid direct; the income-tax to be shown as so deducted in the life insurance Revenue Account is British Indian, United Kingdom, Foreign and Dominion income-tax, but the income-tax to be shown as deducted in Revenue Accounts of any other classes of business is British Indian income-tax only.

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## PART II.—FORMS.

## FORM D.

## Form of Revenue Account applicable to Life Insurance Business.

Revenue Account of \_\_\_\_\_ for the year ended 19\_\_\_\_, in respect of \_\_\_\_\_ Business.

	Business within India.	Business out of India. (a)	Total.		Business within India.	Business out of India. (a)	Total.
	Rs.	Rs.	Rs.		Rs.	Rs.	Rs.
—				—			
Claims under policies (including provision for claims due or intimated), less Re-insurances—				Balance of Fund at the beginning of the year .. .. .			
By death .. .. .				Premiums, less Re-insurances—			
By maturity .. .. .				(i) First year premiums .. .. .			
Annuities, less Re-insurances .. .. .				(ii) Renewal premiums .. .. .			
Surrenders (including Surrenders of Bonus), less Re-insurances .. .. .				(iii) Single premiums .. .. .			
Bonuses in cash, less Re-insurances .. .. .				Consideration for Annuities granted, less Re-insurances (c) .. .. .			
Bonuses in Reduction of Premiums, less Re-insurances .. .. .				Interest, Dividends and Rents .. .. .	Rs.		
Commission to insurance agents (less that on Re-insurances) .. .. .				Less—Income-tax thereon (d) .. .. .	Rs.		
Expenses of Management (b)—				Registration Fees .. .. .			
1. Allowances and Commission (other than commission to insurance agents) .. .. .				Other Income (to be specified) (e) .. .. .			
2. Salaries, etc. (other than to agents and those contained in item No. 1) .. .. .				Loss transferred to Profit and Loss Account			
3. Travelling expenses .. .. .				Transferred from Appropriation Account..			
4. Directors' fees .. .. .				Carried over .. .. .			
Carried over .. .. .							

FORM D.—*contd.*

	Business within India.	Business out of India. (a)	Total.	Business within India.	Business out of India. (c)	Total.
	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
—						
Brought forward ..						
3. Auditors' fees ..						
6. Law charges ..						
7. Advertisements ..						
8. Printing and Stationery ..						
9. Other expenses of management (accounts to be specified) ..						
10. Other payments (accounts to be specified) ..						
11. Rents for offices belonging to and occupied by the insurer ..						
12. Rents of other offices occupied by the insurer ..						
Bad Debts ..						
United Kingdom, British Indian, Dominion and Foreign Taxes ..						
Other Expenditure (to be specified) ..						
Profit transferred to Profit and Loss Account ..						
Balance of Fund at the end of the year as shown in the Balance-Sheet ..						

Notes.

- (e) In the case of an insurer having his head office in British India, these columns apply only to business the premiums in respect of which are payable outside India.
- (f) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately. Under this item the salary paid to the managing agent or managing director shall be shown separately from the total amount paid as salaries to the remaining staff.

(e) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(d) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(e) Under the head "Other Income" fines, if any, realized from the staff must be shown separately. All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

(f) In the case of an insurer having his principal place of business outside British India, the expenses of management for business out of India and total business need not be split up into the several sub-heads, if they are not so split up in his own country.

FORM DD.  
*Classified statement of life insurance policies of the*

*Company, for the year ending 19 .*

	New life insurance business in respect of which a premium has been paid in the year.				Total life insurance business in force at end of the year.		Premium income for which credit has been taken in the revenue account.
	Number of policies.	Sums insured and annuities per annum.	Single premiums (including consideration for immediate or deferred annuities and all other premiums paid at the outset where no subsequent premium is payable).	Yearly renewal premium income.	Number of policies.	Sums insured with bonuses and annuities per annum.	
		Ra.	Ra.	Ra.		Ra.	Ra.
<i>Ordinary policies.</i>							
In India .. ..	..						
Out of India .. ..	..						
Total .. ..	..						
<i>Annuity contracts, etc.</i>							
In India .. ..	..						
Out of India .. ..	..						
Total .. ..	..						
<i>Group insurance policies.</i>							
In India .. ..	..						
Out of India .. ..	..						
Total .. ..	..						

The amounts should be stated to the nearest rupees and after deduction of re-insurances.

FORM DDD.

Additions to and deductions from policies of the *Company for the year ending* 19 .

	No.	Ordinary life insurance policies insuring money to be paid on death or survivorship.		Annuities.
		Sum assured.	Reversionary bonus additions.	
		Rs.	Rs.	Rs.
(1) Policies at beginning of year ..	..			
(2) New policies issued ..	..			
(3) Old policies revived ..	..			
(4) Old policies changed and increased ..	..			
(5) Bonus additions allotted ..	..			
Total	..			
<i>Discontinued during year.</i>				
(6) By death ..	..			
(7) By survivorship or the happening of the contingencies insured against other than death ..	..			
(8) By expiry of term under temporary insurances ..	..			
(9) By surrender of policy ..	..			
(10) By surrender of bonus ..	..			
(11) By forfeiture or lapse ..	..			
(12) By change and decreases ..	..			
(13) By being not taken up ..	..			
Total discontinued	..			
Total existing at end of year	..			

*Note.*—A separate statement must be given in respect of each class of life insurance business for which a separate revenue account is submitted. Insurers having their principal place of business in British India shall give the information required in the form separately for business transacted in India and business transacted outside India and insurers having their principal place of business outside British India will furnish information regarding business transacted in India only.

FORM DDDD.

Particulars of the policies forfeited or lapsed in the last year under review, less those revived and reinstated for full benefits, classified according to the year in which they were issued.

Year in which the policies were issued.	Number of policies forfeited or lapsed.	Sum insured under policies forfeited or lapsed.
Year ending 19 , being the year under review ..	....	Rs. ....
Year ending 19 , being the year previous to that under review .. ..	....	....

And so on, the number of and sum insured under policies forfeited or lapsed in the last year under review being stated after classification according to each of the preceding years in which they were issued.

A separate statement must be given in respect of each class of life insurance business for which a separate revenue account is submitted. Insurers having their principal place of business in British India shall give the information required in the form separately for business transacted in India and business transacted outside India and insurers having their principal place of business outside British India will furnish information regarding business transacted in India only.

FORM E.

Form of Revenue Account applicable to Marine Insurance Business.

Revenue Account of \_\_\_\_\_ for the year ended 19\_\_\_\_  
in respect of Marine Insurance Business.

	Current year.					Current year.			
	Last preceding year.					Last preceding year.			
	Previous years.					Previous years.			
	Total.					Total.			
	Rs.	Rs.	Rs.	Rs.		Rs.	Rs.	Rs.	Rs.
*Claims paid (less Salvage and Re-insurances) (a) (c)					Balance of Marine Insurance Business Account at beginning of the year:				
*Commission ..					Balances ..				
*Expenses of Management (b) ..					Additional Reserve (if any) ..				
*Bad Debts ..					*Premiums (less Returns, Re-insurances, Brokerages and Discount) (c) ..				
United Kingdom, British Indian, Dominion and Foreign Taxes ..					Interest, Dividends and Rents Rs.				
*Other Expenditure (to be specified)					Less—Income-tax thereon Rs.				
Profit transferred to Profit and Loss Account ..									
Balance of Marine Insurance Business Account at end of year as shown in the Balance-Sheet:					*Other income (to be specified) (d) ..				
Balances ..					Loss transferred to Profit and Loss Account ..				
Additional Reserve (if any) ..					Transferred from Appropriation Account ..				

Notes.

(a) This heading must include all expenses directly incurred in settling claims.  
(b) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(c) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claimants in India and claimants outside India, and for premiums derived from business effected in India and effected outside India must be given.

(d) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

\*Where the account is furnished under the provisions of clause (b) of sub-section (2) of section 16 of the Insurance Act, 1938, by an insurer to whom that section applies, separate figures for business within India and business out of India must be given against the items marked with an asterisk. Against all other items the total amount for the business as a whole may be given.

## FORM F.

*Form of Revenue Account applicable to Fire Insurance Business and to Accident and Miscellaneous Insurance Business including Workmen's Compensation and Motor Car Insurance Business.*

Revenue Account of \_\_\_\_\_ for the year ended 19 \_\_\_\_\_  
in respect of \_\_\_\_\_ Business.

*Claims under policies, less Re-insurances (a) (d) :	Ra.	Balance of Account at beginning of the year :	Ra.
Paid during the year Ra.		Reserve for Unexpired Risks Ra.	
Total estimated liability in respect of outstanding claims at the end of the year whether due or intimated Ra.		Additional Reserve (if any) Ra.	
Total			
Less—Outstanding at end of previous year (b) Ra.		*Premiums, less Re-insurances (d) ..	
*Commission ..		Interest, Dividends and Rents Ra.	
*Expenses of Management (c) ..		Less—Income-tax thereon Ra.	
*Bad Debts ..			
United Kingdom, Foreign and Dominion Taxes ..			
*Other Expenditure (to be specified) Profit transferred to Profit and Loss Account ..		*Other Income (to be specified) ..	
Balance of Account at the end of the year as shown in the Balance-Sheet :		Loss transferred to Profit and Loss Account ..	
Reserve for Unexpired Risks being % of premium income of year Ra.		Transferred from Appropriation Account ..	
Additional Reserve (if any) Ra.			
	Ra.		Ra.

## Notes.

(a) This heading must include all expenses directly incurred in settling claims.

(b) If in any year the claims actually paid and those still unpaid at the end of that year in respect of the previous year or years are in excess of the amount included in the previous year's Revenue Account as provision for outstanding claims, then the amount of such excess must be shown in the Revenue Account.

(c) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(d) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claimants in India, and claimants outside India, and for premiums derived from business effected in India and effected outside India must be given.

(e) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

\*Where the account is furnished under the provisions of clause (b) of sub-section (2) of section 16 of the Insurance Act, 1938, by an insurer to whom that section applies, separate figures for business within India and business out of India must be given against the items marked with an asterisk. Against all other items the total amount for the business as a whole may be given.

THE FOURTH SCHEDULE.

(See section 13.)

*Regulations for the preparation of Abstracts of Actuaries' Reports and Requirements applicable to such Abstracts.*

PART I.

*Regulations.*

1. Abstract and Statements must be so arranged that the numbers and letters of the paragraphs correspond with those of the paragraphs of Part II of this Schedule.

2. In showing the proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums, in accordance with the requirements of paragraph 4 of Part II of this Schedule, no credit is to be taken for any adjustments made in order to secure that no policy is treated as an asset.

3. (1) The average rate of interest yielded in any year by the assets constituting a life insurance fund shall, for the purposes of paragraph 5 of Part II of this Schedule, be calculated by dividing the interest of the year by the mean fund of the year; and for the purposes of any such calculation the interest of the year shall be taken to be the whole of the interest credited to the life insurance fund during the year after deduction of income-tax charged thereon (any refund income-tax in respect of expenses of management made during the year being taken into account), and the mean fund of the year shall be ascertained by adding a sum equal to one-half of the amount of the life insurance fund at the beginning of the year to a sum equal to one-half of that fund at the end of the year, and deducting from the aggregate of those two sums an amount equal to one-half of the interest of the year.

(2) For the purposes of the calculation aforesaid either—

- (a) all profits and income arising during the year from sums invested in reversions shall be included in the interest credited to the life insurance fund during the year; or
- (b) such portion of the life insurance fund as is invested in the purchase of reversions, and the profits and income arising therefrom, shall be excluded from the calculation; but in that case a statement must be added to the information required under the said paragraph 5, showing, in respect of the portion of the fund so excluded as aforesaid, the average rate of annual profit and income for which credit has been taken during the five years last preceding the valuation date, and explaining the manner in which the said average rate has been calculated.

(3) The information given in accordance with the requirements of the said paragraph 5 shall show clearly by which of the methods hereinbefore in this regulation mentioned the sums invested in reversions and the profits and income arising therefrom have been dealt with.

4. Every abstract prepared in accordance with the requirements of Part II of this Schedule shall be signed by an actuary and shall contain a certificate by him to the effect that he has satisfied himself as to the accuracy of the valuations made for the purposes thereof and of the valuation data :

Provided that in the case of an abstract prepared on behalf of an insurer, if the actuary who signs the abstract is not a permanent officer of the insurer, the certificate as to the accuracy of the valuation data shall be given and signed by the principal officer of the insurer and the actuary shall include in the abstract a statement signed by him showing what precautions he has taken to ensure the accuracy of the data.

5. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely :—

“extra premium” means a charge for any risk not provided for in the minimum contract premium :

“inter-valuation period” means, as respects any valuation, the period to the valuation date of that valuation from the valuation date of the last preceding valuation in connection with which an abstract was prepared under this Act or under the enactments repealed by this Act, or, in a case where no such valuation has been made in respect of the class of business in question, from the date on which the insurer began to carry on that class of business ;

“maturity date” means the fixed date on which any benefit will become payable either absolutely or contingently ;

“net premiums” means as respects any valuation the premiums taken credit for in the valuation ;

“premium term” means the period during which premiums are payable ;

“valuation date” means as respects any valuation the date as at which the valuation is made.

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## PART II.

### *Requirements applicable to an Abstract in respect of Life Insurance Business.*

The following tabular statements shall be annexed to every abstract prepared in accordance with the requirements of this Part of this Schedule, namely :—

(a) a Consolidated Revenue Account, in the Form G annexed to this Part of this Schedule, for the inter-valuation period (except that it shall not be necessary to prepare such an account in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business) ; and

(b) a Summary and Valuation in the Form H annexed to this Part of this Schedule of the policies included at the valuation date in the class of business to which the abstract relates ; and

- (c) a Valuation Balance-Sheet in the Form I annexed to this Part of this Schedule ; and
- (d) a statement in Form DDD as set forth in Part II of the Third Schedule of the additions to and deductions from the number of policies and the sums insured thereunder for each class of life insurance ; and
- (e) a statement in Form DDDD as set forth in Part II of the Third Schedule of particulars of policies forfeited or lapsed under each class of life insurance ;

and every such abstract shall show—

1. The valuation date.

2. The general principles and full details of the methods adopted in the valuation of each of the various classes of insurances and annuities shown in the said Form H, including statements on the following points :—

- (a) whether the principles were determined by the instruments constituting the company or by its regulations or bye-laws or how otherwise ;
- (b) the method by which the net premiums have been arrived at and how the ages at entry, premium terms and maturity dates have been treated for the purpose of the valuation ;
- (c) the methods by which the valuation age, period from the valuation date to the maturity date, and the future premium terms, have been treated for the purpose of the valuation ;
- (d) the rate of bonus taken into account where by the method of valuation definite provision is made for the maintenance of a specific rate of bonus ;
- (e) the method of allowing for—
  - (i) the incidence of the premium income ; and
  - (ii) premiums payable otherwise than annually ;
- (f) the methods by which provision has been made for the following matters, namely :—
  - (i) the immediate payment of claims ;
  - (ii) future expenses and profits in the case of limited payment and paid-up policies ;
  - (iii) the reserve in respect of lapsed policies, not included in the valuation, but under which a liability exists or may arise ; and whether any reserves have been made for the matters aforesaid ;
- (g) whether under the valuation method adopted any policy would be treated as an asset, and if so, what steps, if any, have been taken to eliminate such asset ;
- (h) a statement of the manner in which policies on under-average lives and policies subject to premiums which include a charge for climatic, military or other extra risks have been dealt with ; and
- (i) the rates of exchange at which liabilities in respect of policies issued in foreign currencies have been converted into rupees and what provision has been made for possible increase of liability arising from future variations in the rates of exchange.

3. The table of mortality used, and the rate of interest assumed, in the valuation.

4. The proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums, separately specified in respect of insurances with immediate profits, with deferred profits, with profits under discounted bonus systems, and without profits.

5. The average rates of interest yielded by the assets, whether invested or uninvested, constituting the life insurance fund for each of the years covered by the valuation date.

6. The basis adopted in the distribution of profits as between the insurer and policy-holders, and whether such basis was determined by the instruments constituting the company, or by its regulations or bye-laws, or how otherwise.

7. The general principles adopted in the distribution of profits among policy-holders, including statements on the following points, namely :—

- (a) whether the principles were determined by the instruments constituting the company, or by its regulations or bye-laws, or how otherwise ;
- (b) the number of years' premiums to be paid, period to elapse and other conditions to be fulfilled before a bonus is allotted ;
- (c) whether the bonus is allotted in respect of each year's premium paid, or in respect of each completed calendar year or year of assurance or how otherwise ; and
- (d) whether the bonus vests immediately on allocation, or, if not, the conditions of vesting.

8. (1) The total amount of profits arising during the inter-valuation period, including profits paid away and sums transferred to reserve funds or other accounts during that period, and the amount brought forward from the preceding valuation (to be stated separately) and the allocation of such profits—

- (a) to interim bonus paid ;
- (b) among policy-holders with immediate participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses) ;
- (c) among policy-holders with deferred participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses) ;
- (d) among policy-holders in the discounted bonus class, giving the number of the policies participated and the sums assured thereunder (excluding bonuses) ;
- (e) to the insurer, or in the case of an insurance company, shareholders or to shareholders' accounts (any such sums passed through the accounts during the inter-valuation period to be separately stated) ;
- (f) to every reserve fund or other fund or account (any such sums passed through the accounts during the inter-valuation period to be separately stated) ;
- (g) as carried forward unappropriated.

(2) Specimens of bonuses allotted as at the valuation date to policies for one thousand rupees—

- (a) for the whole term of life effected at the respective ages of 20, 30 and 40, and having been in force respectively for five years, ten years, and upwards at intervals of ten years ; and
- (b) for endowment insurances effected at the respective ages of 20, 30 and 40, for endowment terms of fifteen, twenty and thirty years, and having been in force respectively for five years, ten years and upwards at intervals of ten years ;

together with the amounts apportioned under the various manners in which the bonus is receivable.

9. A statement in Form J annexed to this Part of this Schedule of specimen policy reserve values held or required to be held according to the methods adopted in the valuation, and specimen minimum surrender values in respect of whole life insurance policies for Rs. 1,000 with premiums payable throughout life effected at the respective ages of 20, 30, 40 and 50, and immediately on payment of the first, second, third, fourth, sixth, seventh, eighth, ninth, tenth, fifteenth and twentieth annual premium ; with similar specimen policy reserve values and specimen surrender values in respect of whole life insurance policies subject to premiums for 20 years and of endowment insurance policies maturing at age 55.

10. A statement showing how the liability under any disability clause in a policy has been determined in the valuation with full information of the tables of sickness or accident used for the purpose.

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FORM G.  
Consolidated Revenue Account of      for      years commencing and ending

	Business within India.	Total.	Business within India.	Total.
	Ra.	Ra.	Ra.	Ra.
Claims under Policies (including provision for claims due or intimated), less Re-insurances—				
By death .. .. .				
By maturity .. .. .				
Annuities, less Re-insurances .. .. .				
Survivors (including Surrenders of Bonuses), less Re-insurances .. .. .				
Bonuses in Cash, less Re-insurances .. .. .				
Bonuses in Reduction of Premiums, less Re-insurances .. .. .				
Commission (less that on Re-insurances) .. .. .				
Expenses of Management (a)—				
Agents' and Canvasers' allowance .. .. .				
Salaries, &c. (other than to Agents and Canvasers) .. .. .				
Travelling expenses .. .. .				
Directors' fees .. .. .				
Auditors' fees .. .. .				
Medical fees .. .. .				
Law charges .. .. .				
Advertising .. .. .				
Printing and Stationery .. .. .				
Other expenses of management (accounts to be specified) .. .. .				
Other payments (accounts to be specified) .. .. .				
Rents for offices belonging to and occupied by the company .. .. .				
Balance of Life Insurance Fund at the beginning of the period .. .. .				
Premiums, less Re-insurances .. .. .				
Consideration for Annuities Granted, less Re-insurances (b) .. .. .				
Interest, Dividends and Rents .. .. .				
Less—Income-tax thereon (c) .. .. .				
Registration Fee .. .. .				
Other Income (to be specified) .. .. .				
Loss transferred to Profit and Loss Account .. .. .				
Transferred from Appropriation Account .. .. .				

Rents of other offices occupied by the company				
United Kingdom, British Indian, Dominion and				
Foreign Taxes .. .. .				
Bad Debts .. .. .				
Other Expenditure (to be specified) .. .. .				
Profit transferred to Profit and Loss Account .. .. .				
Balance of Life Insurance Fund at end of the				
period as shown in the Balance-Sheet .. .. .				
				Rs.

Notes.

- (a) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately.
- (b) All single premiums for annuities, whether immediate or deferred, must be included under this heading.
- (c) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.
- (d) In the case of an insurer having his principal place of business outside British India the expenses of management for the total business need not be split up into the several sub-heads, if they are not so split up in his own country.

FORM H.

Summary and Valuation of the Policies of

as at

19

Description of Transactions.	Particulars of the policies for Valuation.				Valuation.			
	Number of policies.	Sums Assured.	Bonuses.	Office Yearly Pre-mium.	Net Yearly Pre-mium.	Sums Assured and Bonuses.	Office Yearly Pre-mium.	Net Yearly Pre-mium.
<b>DIVISION I.</b>								
<i>Insurances.</i>								
Group A.—								
With immediate participation in profits								
For whole term of life								
Other classes (to be specified)								
Extra premiums								
Total insurances								
Deduct—Re-insurances								
Net insurances								
Group B.—								
With deferred participation in profits								
For whole term of life								
Other classes (to be specified)								
Extra premiums								
Total insurances								
Deduct—Re-insurances								
Net insurances								
Group C.—								
Under discounted bonus systems								
For whole term of life								
Other classes (to be specified)								
Extra premiums								
Total insurances								
Deduct—Re-insurances								
Net insurances								
Total insurances with profits								

[illegible]

**Grand D.—**

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*Notes.*

1. Items in this Summary are to be stated to the nearest rupee.
2. No policy of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, is to be included in Groups A, B, C or D of this Form: any such policies must be shown in a separate Group which must be added to the Form.
3. If policies without participation in profits but with a guaranteed rate of bonus are issued they must be separately specified in Group D of this Form.
4. Policies under which there is a waiver of premiums during disability must be shown as a separate class.
5. Separate forms must be prepared in respect of classes of policies valued by different tables of mortality or at different rates of interest or involving the valuation of net premiums on different bases.
6. In cases where separate valuations of any portion of the business are required under local laws in places outside British India and reserves need on such valuations are deposited in such places, a statement must be furnished in respect of the business so valued in each such place showing the total number of policies, the total sums assured and bonuses, the total office yearly premiums, and the total net liability on the bases as to mortality and interest adopted in each such place with a statement as to such bases respectively.
7. Office and net premiums and the values thereof must be shown after deduction of abatements made by the application of bonus.



FORM J.

Specimen policy reserve values and minimum surrender values under a policy for Rs. 1,000.

Number of premiums paid.	Age at entry 20.		Age at entry 30.		Age at entry 40.		Age at entry 50.	
	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender value.
1.								
2.								
3.								
4.								
5.								
6.								
7.								
8.								
9.								
10.								
15.								
20.								

Note.—Items in this Form to be stated to the nearest rupee.

**THE FIFTH SCHEDULE.**

*(See section 13.)*

*Regulations for preparing statements of business in force and requirements applicable to such statements.*

**PART I.**

*Regulations.*

1. Statements prepared under this Schedule must be prepared, so far as practicable, in tabular form and must be identified by numbers and letters corresponding with those of the paragraphs of Part II of this Schedule.

2. Except with respect to rates of premium or contribution, items in statements prepared under this Schedule are to be shown to the nearest rupee.

3. Extra premium shown in the forms of Summary and Valuation prepared under the Fourth Schedule to this Act must not be included in statements prepared under this Schedule.

4. Every statement prepared under this Schedule shall be signed by the actuary making the investigation in connection with which it is prepared.

5. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

- (a) "annual loading" means the provision made for future expenses and profits;
- (b) "extra premiums" means a charge for any risk not provided for in the minimum contract premium;
- (c) "net premiums" means the premiums taken credit for in the valuation in connection with which any statement is prepared; and
- (d) "valuation date" means as respects any valuation the date at which the valuation is made.

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**PART II.**

*Requirements for statements applicable to Life Insurance Business.*

The statements required to be prepared under this Part of this Schedule are as follows, namely:—

1. Statements, separately prepared in respect of policies with and without participation in profits, showing—

- (a) as respects policies for the whole term of life, the rates of office premiums charged, in accordance with the published tables in use, for new policies giving the rates for decennial ages at entry from 20 to 70 inclusive; and
- (b) as respects endowment insurance policies, the rates of office premiums charged, in accordance with the published

tables in use, for new policies with original terms of ten, fifteen, twenty, thirty and forty years, giving the rates for decennial ages at entry from 20 to 40 inclusive, but excluding policies under which the age at maturity exceeds 60.

2. Statements, separately prepared in respect of policies with immediate profits, with deferred profits, with profits under discounted bonus systems, and without profits, showing in quinquennial groups—

- (a) as respects policies for the whole term of life—
  - (i) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped according to ages attained ;
  - (ii) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable throughout life, and of the corresponding net premiums, grouped according to ages attained ; and
  - (iii) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable for a limited number of years, and, either, the corresponding net premiums grouped in accordance with the grouping adopted for the purposes of the valuation, or, the annual loading reserved for the remaining duration of the policies, grouped according to ages attained ;
- (b) as respects endowment insurance policies—
  - (i) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped in accordance with the grouping adopted for the purposes of the valuation ; and
  - (ii) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable, and of the corresponding net premiums, grouped in accordance with the grouping adopted for the purposes of the valuation :

Provided that—

- (a) as respects endowment insurance policies which will reach maturity in less than five years, the information required by sub-paragraph (b) (i) of this paragraph must be given for each year instead of in quinquennial groups ; and
- (b) where the office premiums payable under policies for the whole term of life for a limited number of years, or the office premiums payable under endowment insurance policies, or the corresponding net premiums, are grouped for the purposes of the valuation otherwise than according to the number of years' payments remaining to be made, or, where the sums assured under endowment insurance policies are grouped for the purposes of the valuation otherwise than according to the years in which the policies will mature for payment or in which they are assumed to mature if earlier than the true year, then, in any such case the valuation constants and an explanation of the method by which they are calculated must be given for each group, and in the case of the sums assured under endowment

insurance policies a statement must also be given of the amount assured maturing for payment in each of the two years following the valuation date.

3. Statements as respects any policies in force under which premiums cease to be payable, whether permanently or temporarily, during disability arising from sickness or accident, showing the total amount of the office premiums payable.

4. Statements as respects immediate annuities on single lives for the whole term of life, separately prepared in respect of annuities on male and female lives, showing in quinquennial age groups the total amount of such annuities.

5. Statements as respects deferred annuities, separately prepared in respect of annuities on male and female lives, showing the specimen reserve values for annuities of one hundred rupees which will be produced on maturity on the basis of valuation adopted at ages, in the case of male lives, 60 and 65, and in the case of female lives, 55 and 60; the said statements must show the specimen reserve values which will be produced under the table of annual premiums in use for new policies, and if under any other table of annual premiums in use for any other deferred annuity policies in force smaller reserve values will be produced, the like specimens of these must also be given.

6. Statements as respects any policies of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, showing the total claims paid since the date as at which the last statements were prepared under this Part of this Schedule or, where no such statements have been prepared, since the date on which the insurer began to carry on the class of business to which the statements relate, and the reserves for unexpired risks and outstanding claims.

#### THE SIXTH SCHEDULE.

(See section 55.)

##### *Rule as to the valuation of the Liabilities of an Insurer in Insolvency or Liquidation.*

The liabilities of an insurer in respect of current contracts effected in the course of life insurance business including annuity business, shall be calculated by the method and upon the basis to be determined by an actuary approved by the Court, and the actuary so approved shall, in determining as aforesaid, take into account—

- (a) the purpose for which such valuation is to be made,
- (b) the rate of interest and the rates of mortality and sickness to be used in valuation, and
- (c) any special directions which may be given by the Court.

The liabilities of an insurer in respect of current policies other than life policies shall be such portion of the last premium paid as is proportionate to the unexpired portion of the policy in respect of which the premium was paid.

## APPENDIX II.

### THE INSURANCE RULES, 1939.

#### *Preliminary.*

1. **Short title.**—These rules may be called the Insurance Rules, 1939.

2. **Definitions.**—In these rules,—

“the Act” means the Insurance Act, 1938 (IV of 1938), and  
“the Bank” means the Reserve Bank of India.

#### *Actuaries.*

3. **Qualifications of actuaries.**—For the purposes of the Act, an actuary shall be either:

- (a) a Fellow of the Institute of Actuaries, London, or of the Faculty of Actuaries in Scotland, or
- (b) an Associate of such Institute or Faculty, or any other person having actuarial knowledge, to whom a certificate has been granted under rule 4.

4. **Grant of certificates to actuaries.**—An Associate of the Institute of Actuaries, London, or of the Faculty of Actuaries in Scotland, or other person, desiring to obtain a certificate under this rule, shall apply in writing to the Superintendent of Insurance stating his qualifications and the particular duties of an actuary under the Act which he wishes to undertake, and the Superintendent of Insurance may, if he is satisfied as to the applicant's competence, grant him a certificate authorising him to perform all or certain of the duties of an actuary under the Act subject to such conditions and restrictions as may be specified in the certificate.

#### *Deposits with the Bank.*

5. **Deposits with the Bank.**—(1) Sterling securities shall be sent by the depositor with a covering letter to the Manager, Reserve Bank of India, London, and shall be held by the London office of the Bank on behalf of the Calcutta office of the Bank.

(2) Deposits in sterling securities shall not be brought on the books of the Calcutta office of the Bank until that office has received an intimation in Form I from the London office of the Bank that the securities have been received.

(3) Deposits, other than deposits in sterling securities, shall be sent by the depositor with a covering letter to the Manager, Reserve Bank of India, Calcutta, and shall be held by the Calcutta office of the Bank.

(4) Securities shall be duly transferred to the Bank by the depositor.

(5) Upon receipt of the intimation referred to in sub-rule (2) or of a deposit under sub-rule (3) the Calcutta office of the Bank shall send—

- (a) a certificate in Form II to the depositor; and
- (b) a statement in Form III to the Superintendent of Insurance:

Provided that, if the Bank is not satisfied as to the validity of the title of the depositor to the securities, it may return them to him

with the request that they shall first be renewed or that such other measures as may be necessary shall be taken to clear the title.

(6) The market value of sterling securities held by the Bank shall be converted at 1s. 6d. to the rupee.

6. **Changes in deposits.**—When the form or amount of a deposit is changed by reason of a subsequent deposit, a substitution or a payment under sub-section (9) or sub-section (10) of section 7 of the Act, the Bank shall, within two weeks from the entry of such change in the books of the Bank, send a fresh certificate and a fresh statement of the nature, and in the manner, described in clauses (a) and (b) of sub-rule (5) of rule 5.

7. **Maturing of deposits.**—When security in deposit matures, or when any yield on such a security ceases to accrue, the Bank shall not be bound to inform the depositor; but, upon receipt of a requisition from the depositor made in writing and in accordance with the provisions of the Act, the Bank shall, within six weeks of such a receipt, collect the discharge value and hold the amount in cash to the credit of the depositor or invest it in securities specified by the depositor.

8. **Interest and dividends on deposits.**—(1) No interest shall be paid on cash deposits.

(2) Interest or dividends on sterling securities shall be remitted by the London office of the Bank to the Calcutta office of the Bank at the Telegraphic Transfer Rate on India prevailing on the date of realisation of the interest or dividends.

(3) The Calcutta office of the Bank shall remit interest or dividends on securities other than sterling securities, and amounts received from the London office of the Bank under sub-rule (2) without delay to the depositor at an office in India to be specified by the depositor,—

(a) if the office so specified is at a place where there is an office of the Bank or a branch of the Imperial Bank of India, by means of a Government draft, and

(b) in other cases, by a Security Deposit Interest Payment Draft on the nearest Government Treasury,

after deduction of a commission of annas four on every sum of Rs. 100 or part thereof.

9. **Withdrawals, etc., of deposits.**—(1) Withdrawals and payments from deposits and purchases of securities shall not be made save in accordance with the provisions of the Act and on receipt by the Bank of a requisition in writing and in accordance with the provisions of the Act from the depositor, a liquidator acting in accordance with law or a Court of competent jurisdiction, as the case may be.

(2) The Bank shall not be bound, in pursuance of sub-rule (1), to return securities actually deposited, but may substitute therefor new scrip of securities of the same description and amount.

(3) The Bank shall be entitled to charge, for the purchase of securities, any brokerage payable by the Bank in respect of such purchase.

10. **Information as regards deposits.**—(1) The Superintendent of Insurance shall be entitled, free of any fee, to inspect or to require from the Bank any information relating to any security deposited with the Bank under the Act.

(2) The Bank shall, if so required, furnish the Superintendent of Insurance, or any person authorised by him in that behalf in writing, with a copy of any entry in any register or book maintained by the Bank relating to any deposit made with the Bank under the Act.

(3) The Bank shall publish in the *Gazette of India* as soon as may be after the 1st January in each year a list in Form IV of deposits made with it under the Act, as at 31st December of the preceding year.

*Prospectuses, Tables and Proposal Forms.*

**11. Prospectuses and tables.**—(1) No person shall supply or exhibit any prospectus or table of premium rates to any other person with a view to the issue of a policy of insurance unless such prospectus or table includes—

- (a) a description of the contingency or contingencies to be covered by insurance and the class or classes of lives or property eligible for insurance under the terms of such prospectus or table;
- (b) a full statement of the circumstances, if any, in which rebates of the premiums quoted in the prospectus or table shall be allowed on the effecting or renewal of a policy, together with the rates of rebate applicable to each case; and
- (c) a copy of section 41 of the Act.

(2) The provisions of sub-rule (1) shall be deemed to have been complied with if to every such prospectus or table of premium rates supplied or exhibited after the date of commencement of the Act is attached in the form of an addendum a statement containing so much of the matters referred to in sub-rule (1) as is not already included in the said prospectuses or tables, but every prospectus and table of premium rates printed after the coming into force of the Act shall have the matters referred to in the said clauses incorporated therein.

**12. Proposal forms.**—(1) Every proposal form in the case of life insurance or, in the case of any other form of insurance, the document, if any, forming the basis of the contract, shall contain the statement and copy mentioned in clauses (b) and (c) of sub-rule (1) of rule 11.

(2) The provisions of sub-rule (2) of rule 11 shall apply *mutatis mutandis* to proposal forms, except that, where an addendum is attached to a proposal form, it shall also be signed by the person who signs the proposal form.

*Election of Directors by Policyholders.*

**13. Qualifications of elected directors of insurance companies.**—(1) A person shall not be eligible for election as a director of an insurance company under sub-section (1) of section 48 of the Act unless—

- (a) he holds, otherwise than by way of assignment or transfer, one or more policies of life insurance issued by the company satisfying the following requirements:—
- (i) the policies shall be either whole life policies or endowment life insurance policies, and not encumbered in any way; and

- (ii) the total sum assured by the policies, including any bonuses that may have attached to them before the date of election, is not less than Rs. 2,000, where the company has at that date been carrying on life insurance business for not less than 5 years, and not less than Rs. 1,000 in other cases; and
- (iii) where the company has been carrying on life insurance business for more than 2 years, each of the policies shall have been in force for not less than one, two or three years, according as the company has at the date of election been carrying on life insurance business for not more than 5 years, for more than 5 but not more than 8 years, or for more than 8 years; and
- (b) he is not a director (other than an elected director of the company), manager, legal or technical adviser, managing agent, insurance agent or employee of the insurer, or an employer of insurance agents.

(2) If at any date after election as a director, a person ceases to hold one or more policies of life insurance satisfying all the requirements specified in clause (a) of sub-rule (1) or begins to hold any disqualifying office or employment specified in clause (b) thereof, he shall forthwith cease to be an elected director of the company.

**14. Election of directors under section 48.**—(1) The election of directors under section 48 of the Act shall take place at a meeting of the holders of policies of life insurance issued by the company, which shall be held at the place where the principal office of the company is situated.

(2) Not less than 28 days before the meeting is to be held, there shall be inserted in a newspaper published in the English language and in a newspaper published in an Indian language circulating in the place where the principal office of the company is situated and, if there are policyholders of the company residing in a Province other than that in which the principal office of the company is situated, in a newspaper published in a principal language of, and circulating in, that Province, a notice stating the number of directors to be elected at, and the time and place of, such meeting, which shall be fixed with a view to affording voters the fullest opportunities for attending, and informing policyholders how to obtain admission to the meeting according to the manner hereinafter described. Such notice shall also set forth the qualifications which a person must possess in order to be eligible for election as a director, and shall invite applications from eligible persons prepared to accept office:

Provided that, where a company prints on its policies the qualifications of elected directors as set forth in rule 13, and issues, at least three months before the election, to all existing policyholders whose policies do not contain a statement of those qualifications, for attachment to their policies a slip setting forth those qualifications, the notice to be published in newspapers in accordance with this sub-rule need not set forth those qualifications:

Provided further that a company may, in respect of one or more Provinces, instead of publishing the notice in newspapers, send it by post to every policyholder residing therein.

(3) The applications from eligible persons prepared to accept office as elected directors of the company shall be sent by registered post to the principal office of the company so as to reach it not less than 10 days before the date of the meeting. Such applications shall be made in the English language or in a principal language of the Province in which the principal office of the company is situated. If the number of such applicants does not exceed the number of directors to be elected, all such applicants shall be deemed to have been elected as directors, and it shall not be necessary to hold the meeting of policyholders as previously announced. The company shall in that event inform the policyholders forthwith by notice inserted in newspapers as in sub-rule (2), or by notice sent individually by post or by both methods, of the names of persons elected as directors and of the cancellation of the meeting.

(4) Every policyholder who desires to attend the meeting shall apply to the company for a certificate of admission, such application to reach the company not less than 15 days before the date of the meeting, and the company on being satisfied that the applicant holds a policy of life insurance issued by the company shall issue a certificate at least 6 days before the date of the meeting. Such certificate shall, if applied for by post, be sent only to the address of the policyholder, or if applied for in person, be delivered only on production of the relevant policy. A certificate of admission shall not be transferable.

(5) No person other than those whose presence is necessary for the conduct of the meeting shall be admitted to the meeting unless he produces the certificate of admission granted to him under sub-rule (4).

(6) The meeting shall be presided over by the Chairman for the time being of the Board of Directors of the company, or in his absence by any director nominated by him, or in the absence of any such director by a chairman elected by the policyholders present at the meeting.

(7) Votes for the election of directors may be given at the meeting either personally or by proxy and in the manner hereinafter provided in this rule. The instrument appointing a proxy shall be in writing under the hand of the appointor in favour of a policyholder, and shall be presented at the principal office of the company not less than 6 days before the date of the meeting.

(8) Every policyholder present at the meeting shall be given one voting paper on his own behalf and one voting paper in respect of each proxy, if any, which he holds. The number of votes to be given on each voting paper shall not exceed the number of directors to be elected and not more than one vote shall be given on each voting paper to any one candidate.

(9) The votes shall be counted by the company's auditors if present in that capacity, or failing them by scrutineers appointed by the meeting and working under the supervision of the Chairman. The result of the ballot shall be announced at the meeting, and in the event of an equality of votes the election shall be decided by lot.

(10) The first meeting of policyholders in accordance with this rule shall be held not later than one year after the commencement of the Act or in the case of a company incorporated after the commencement of the Act, within two years of the date of registration to carry on life insurance business.

(11) An election held in accordance with this rule shall not be invalid merely by reason of the accidental omission to send any notice or other document to, or the non-receipt of any notice or other document by, any policyholder, or of any other accidental irregularity or informality in the observance of the provisions of this rule.

**15. Elected directors subjected to the same rules as other directors.**—(1) A director elected in accordance with these rules shall, as regards retirement from office and all other matters, be subject to the same rules and regulations as the other directors of the company.

(2) In the event of a casual vacancy arising among the directors elected in accordance with these rules the remaining directors may fill the vacancy by appointing a policyholder who is eligible under rule 13 for election as a director, and the person so appointed shall be subject to retirement at the same time as the director in whose place he is appointed.

*Insurance Agents.*

**16. Issue of licences to insurance agents.**—An individual who desires to obtain or renew a licence to act as an insurance agent shall proceed as follows:—

- (a) He shall pay into the Reserve Bank of India or where there is no office of that Bank into the Imperial Bank of India acting as the agent of that Bank or into any Government Treasury, a fee of one rupee for credit under the head "XXXVI—Miscellaneous Departments—Miscellaneous—Fees realised under the Insurance Act, 1938", and obtain a receipt therefor.
- (b) He shall also obtain from the officer authorised by the Superintendent of Insurance under sub-section (1) of section 42 of the Act for the Province in which the applicant resides, or, if there is no such officer or the applicant resides outside British India, from the Superintendent of Insurance, a form of application for the licence which shall be as prescribed in Form V.
- (c) He shall then send the completed application form together with the receipt to the aforesaid officer or the Superintendent of Insurance, as the case may be, who shall, after taking all reasonable steps to satisfy himself that the application is in order and that the applicant is not disqualified from holding a licence, issue a licence in Form VI:

Provided that where it appears that a former licence of the applicant has been cancelled by the Superintendent of Insurance on the ground that the applicant has knowingly contravened a provision of the Act the officer shall report the matter to the Superintendent of Insurance.

**17. Cancellation of licences.**—Where the Superintendent of Insurance cancels the licence of an insurance agent under sub-section (5) of section 42 of the Act he shall:—

- (a) inform all the officers authorised by him under sub-section (1) of section 42 of the Act that the licence has been cancelled,
- (b) require the agent to return the licence issued to him, and

- (c) cause the fact of cancellation to be announced in the *Gazette of India* and in such Provincial Gazette or Gazettes as he deems fit.

*Provident Societies.*

**18. Transaction of bond investment business.**—(1) Provident societies which immediately before the commencement of the Act were transacting bond investment business may continue to receive premiums or contributions and to make payments in respect of such business but shall not undertake any new business of that class.

(2) For the purpose of sub-rule (1), "bond investment business" means the business of effecting contracts by the issue of bonds, endowment certificates or other documents, whereby in return for one or more premiums paid to the provident society, the payment is insured of a sum or series of sums, at a future date or dates, whether fixed beforehand or determined by chance.

**19. Rules of provident societies.**—(1) Every provident society shall in addition to the matters specified in clauses (a) to (c) of sub-section (1) of section 74 of the Act set forth in its rules:—

- (i) that where a policy is applied for on the life of a person other than the person paying the premiums on such policy, the name of the person paying the premiums and his relationship to the life insured shall be inserted in the policy, the policy shall not be issued till the life insured (or if he be not of age his legal guardian) has given his consent in writing to the insurance being effected, and the amount secured shall not be excessive having regard to the interest of the person paying the premiums in the life insured;
- (ii) the disqualifications, if any, due to change of occupation, residence, or other specified cause;
- (iii) the terms upon which any policy may be kept in force for a reduced benefit without liability to payment of further premiums;
- (iv) a statement to the effect that all policies issued after the commencement of the Act shall have clearly set out therein the matters referred to in section 68 and in clauses (f), (g), (h), (i) and (j) of sub-section (1) of section 74 of the Act and those referred to in clauses (ii) and (iii) above;
- (v) the method of voting at the meetings of the managing body and the number constituting a quorum;
- (vi) a statement that no dividend shall be declared except as a result of a valuation under sub-section (1) of section 81;
- (vii) a statement that no bonus other than an interim bonus shall be declared except as a result of a valuation made in accordance with sub-section (1) of section 81, that the rate of such bonus shall not exceed that recommended by the actuary and that no interim bonus shall be declared at a rate exceeding that approved by an actuary; and
- (viii) a statement that the paid-up capital shall not be treated as part of the society's assets for the purpose of showing a divisible surplus at the time of any investigation made under sub-section (1) of section 81, and that where assets of the nature of organisation or preliminary expenses

exceed the paid-up capital the fund shall be diminished by the amount of such excess for the purpose of ascertaining the financial condition of the society.

(2) All rules made by a Local or Provincial Government under section 24 of the Provident Insurance Societies Act, 1912, are hereby repealed.

**20. Forms of accounts and statements.**—(1) The revenue account and balance sheet of a provident society shall be prepared in accordance with Forms VII and VIII respectively, and in their completion regard shall be had to the notes appended thereto.

(2) If it so desires a provident society may submit a profit and loss account in addition to a revenue account and balance sheet.

(3) The statements required under clauses (a)(i) and (b) of sub-section (2) of section 80 of the Act shall be prepared in accordance with Forms IX and X respectively.

**21. Actuarial reports.**—(1) Whenever an investigation is made into the financial condition of a provident society under section 81 of the Act the report of the actuary—

- (a) shall, so far as practicable, be prepared in accordance with the regulations and requirements contained in the Fourth Schedule to the Act except that it shall not be necessary to supply a consolidated revenue account in Form G, a statement in Form DDD of additions to and deductions from policies and a statement in Form DDDD of particulars of policies forfeited or lapsed;
- (b) shall contain in the appropriate places the information required in clauses (a) to (e) of sub-section (2) of section 81;
- (c) shall state the proportion of the renewal premium income spent in payment of commission and other expenses in each year during the period since the last investigation after allowing, as the cost of the new business of the year,  $7\frac{1}{2}$  per cent of single premiums and 90 per cent of first year's premiums falling due in the year after deduction of those unpaid under policies allowed to lapse in the year;
- (d) shall state whether the actuary has taken steps to prevent the policy reserve values from being less than the minimum surrender values;
- (e) shall have appended to it a certificate as prescribed in sub-section (2) of section 81; and
- (f) shall contain a statement that in no case where a policy has been written off as a lapse does there exist any further liability actual or contingent.

(2) Where an investigation into the financial condition of a provident society is made as at a date other than the expiration of the year of account, the accounts for the period since the expiration of the last year of account and the balance sheet as at the date at which the investigation is made shall be prepared and audited in the manner provided by the Act and these rules.

**22. Signatures to documents submitted by provident societies.**—Every document submitted to the Superintendent of Insurance under section 82 of the Act shall be signed by two or more

directors where the Society is a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby or by the proprietors in any other case, and in addition, in all cases, by the principal officer of the society.

23. Notices under section 92 (6).—The notices referred to in sub-section (6) of section 92 of the Act shall be sent by post to the last known addresses of the persons concerned, as recorded in the society's books, and certificates of posting shall be obtained therefor:

Provided that the liquidator may at his discretion send all or any of the notices by registered post.

#### *Fees.*

24. Fees under the Act and the manner of collection.—(1) The fee for registration under section 3 of the Act shall be one hundred rupees for each of the following classes of insurance business done or to be done by the insurer, namely:—

- (i) life insurance,
- (ii) fire insurance,
- (iii) marine insurance,
- (iv) accident and miscellaneous insurance, including workmen's compensation and motor-car insurance:

Provided that where the business done or to be done is marine insurance business relating to country craft or its cargo and no other form of marine insurance the fee for registration shall be fifty rupees for that class of business and provided further that where an insurer who has obtained a certificate of registration for carrying on marine insurance business relating to country craft or its cargo subsequently applies for registration to carry on any other class of marine insurance business the fee for such registration shall be fifty rupees only.

(2) The fee for registration shall be paid into the Bank or where there is no office of the Bank, into the Imperial Bank of India acting as the agent of that Bank or into any Government Treasury for credit under the head "XXXVI—Miscellaneous Departments—Miscellaneous—Fees realised under the Insurance Act, 1938", and the receipt shall be sent along with the application for registration.

(3) The fees payable under sub-section (1) of section 20 of the Act shall be paid in the manner provided in sub-rule (2).

#### *Miscellaneous.*

25. Additional particulars to be given by actuary.—An actuary investigating the financial condition of an insurer shall, in addition to the reports, statements and abstracts required to be furnished under section 13 of the Act, furnish statements with regard to the following matters:—

- (a) whether he has taken steps to prevent the policy reserve values from being less than the minimum surrender values;
- (b) the proportion of the renewal premium income spent in payment of commission and other expenses in each year, during the period since the last investigation after allowing, as the cost of the new business of the year,  $7\frac{1}{2}$  per cent of

single premiums and 90 per cent. of first year's premiums falling due in the year after deduction of those unpaid under policies allowed to lapse in the year.

26. Form of declaration under section 16 (2) (d).—The declaration referred to in clause (d) of sub-section (2) of section 16 of the Act shall be in Form XI and one copy of the declaration shall be signed in the manner described in sub-section (2) of section 15 of the Act.

27. Returns in respect of dividing insurance business.—Every insurer, so long as he has policies on the dividing principle remaining in force, shall submit all returns required under the Act or these rules in respect of such business separately from the corresponding returns in respect of other insurance business, and along with the revenue account shall also furnish in respect of such business returns in Forms XII, XIII and XIV respectively. Four copies shall be submitted of each of these three last mentioned returns, of which one of each shall be signed in the manner described in sub-section (2) of section 15 of the Act.

# SCHEDULE.

## Form I.

(See Rule 5.)

### RESERVE BANK OF INDIA.

To

The Manager,

Reserve Bank of India,

Calcutta.

London,.....19 .

This is to inform you that the.....  
have this day deposited the undermentioned securities.

Manager.

Number.	Loan.	Face Value (in sterling).	Market Value (ex-dividend) in sterling.	Interest or Dividend paid up to	Remarks.
Total					

(See Rule 5.)

**RESERVE BANK OF INDIA.**

Securities Department.

Calcutta, . . . . . 19 .

Certified that the.....  
have made the undernoted deposits in terms of the Insurance Act, 1938.

**Manager.**

		Approved Securities					Remarks
	Cash.	Number	Loan	Face Value	Interest or Dividend paid up to	Market Value.	
1	2	3	4	5	6	7	

Grand Total of columns 3 and 7—Rs.....\$22,222.22

Form III.

(See Rule 5.)

RESERVE BANK OF INDIA.

Securities Department, Calcutta.

Reference No. Sec./

Dated the.....19

Statement showing the particulars of deposits held on behalf of the.....  
.....under section.....of the Insurance Act, 1938.

Existing deposits (excluding deposits withdrawn).				New deposit.			Total.		
Cash.	Securities.			Cash.	Securities.		Cash.	Securities.	
	Loan.	Face Value.	Book Value.		Loan.	Face Value.		Loan.	Face Value.
Rs.		Rs.	Rs.	Rs.		Rs.	Rs.		Rs.
Total									

Certified that the above agrees with the entries in the Books maintained by the Bank.

Manager.



**Form V.**

(See Rule 16.)

*Application for a licence to act as an Insurance Agent for the year ending  
31st March 19 .*

(1) Full name of the applicant .. .. .	(1)
(2) Father's name .. .. .	(2)
(3) Permanent home address .. .. .	(3)
(4) Present postal address .. .. .	(4)
(5) Age and date of birth .. .. .	(5)
(6) Does the applicant hold a licence and if so since when has he been holding a licence ?	(6)
(7) What is the number of the licence held, if any ? ..	(7)
(8) Has the applicant been found to be of unsound mind by a Court of competent jurisdiction ?	(8)
(9) Has the applicant been found guilty of criminal misappropriation or criminal breach of trust or cheating by a Court of competent jurisdiction ?	(9)
(10) In the course of any judicial proceedings relating to any policy of insurance or the winding up of an insurance company or in the course of an investigation of the affairs of an insurer has the applicant been found guilty of or to have knowingly participated in or connived at any fraud, dishonesty or misrepresentation against an insurer or an assured ?	(10)
(11) Has the applicant's licence been cancelled at any time by the Superintendent of Insurance and if so when ?	(11)
(12) Has an application for a licence ever been refused ? If so, when and by whom ?	(12)

*Declaration.*

I, the applicant, declare that the above answers are true and that the licence for which I hereby apply will be used only by myself for soliciting or procuring insurance business.

Date

19

Signature.

*N.B.—The attention of the applicant is drawn to section 104 of the Insurance Act, 1938, which provides that whoever in any document required for the purposes of any of the provisions of that Act wilfully makes a statement false in any material particular knowing it to be false shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to one thousand rupees, or with both.*

**Form VI.**

(See Rule 16.)

No. of Licence. ....

Licence to act as an Insurance Agent under Part II of the Insurance Act,  
1938.

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of 

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having paid the prescribed fee and having made the necessary declaration  
is hereby authorised to act as an Insurance Agent up to 31st March 19 .

Dated the                      day of                      19 .

Officer authorised under sub-section (1) of section 42 of the Act.  
Superintendent of Insurance.

Signature of Licence-holder  
to be made as soon as licence is received.

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**NOTE.**—If it is desired to renew this licence for a further period the procedure laid down in rule 16 of the Insurance Rules, 1939, shall be followed and applications for renewal should reach the issuing authority at least two months before the existing licence expires.

Form VII.

(See Rule 20.)

Revenue Account of the (here insert name of provident society) for the year ending.....19

Dividends to shareholders payable on for the year ending (This is to be stated here by Societies not supplying a Profit and Loss Account.) Claims under policies (including provision for claims due or intimated)—  To be specified separately according to the classes of contingency set forth in section 65.  Other classes (to be separately specified).	Rs. A. P.	Balance of Funds at the beginning of the year—  Funds, specified separately according to the classes of contingency set forth in section 65.  Investment Reserve Fund .. Dividend Reserve Fund .. Other Funds (to be separately described).	Rs. A. P.
Annuities .. .. Surrenders including Surrenders of Bonus .. ..	Rs. A. P.	Shareholders' capital paid up at the beginning of the year. Shareholders' capital paid up during the year.	



Form VII—*concl.*

	Rs. A. P.		Rs. A. P.
<p>Bad debts .. .. .</p> <p>Other payments (accounts to be specified) ..</p> <p>Shareholders' capital paid up at the end of the year as per balance sheet.</p>		<p>Consideration for annuities granted ..</p>	
<p>[Profit transferred to Profit and Loss Account if a Profit and Loss Account is submitted.]</p> <p>Balance of funds at the end of the year as per balance sheet—</p>		<p>Interest, dividends and rents ..</p> <p>Less income-tax ..</p>	<p>Rs. A. P.</p>
		<p>Entrance fees .. .. .</p>	<p>.. .. .</p>
		<p>Fines .. .. .</p>	<p>.. .. .</p>
<p>Funds, specified separately according to the classes of contingency set forth in section 65.</p> <p>Investment Reserve Fund ..</p> <p>Dividend Reserve Fund ..</p> <p>Other funds (to be separately described).</p>		<p>(Other income (accounts to be specified) ..</p> <p>[Loss transferred to Profit and Loss Account if a Profit and Loss Account is submitted.]</p>	

*Notes relating to the Revenue Account—(Form VII).*

1. All items in this account shall be net amounts after deduction of the amounts paid and received in respect of reassurances of the society's risks.

2. A society transacting more than one class of business shall show in its accounts the premium income, the claims and the funds separately for business under each class of contingency prescribed or authorised under section 65. (See rule 18.)

3. If any sum has been deducted from the expenses and credit has been taken for it in the balance sheet as an asset the sum so deducted shall be shown in a separate statement, as follows:—

*Statement regarding preliminary expenses, etc., submitted by the  
for the year ending 19 .*

Balance at beginning of year either of the adverse balance of any profit and loss or revenue account or such bad debts and preliminary and other expenses as may not have been included in the profit and loss or revenue account either as loss or outgo but for which credit is taken in the balance sheet as assets .. .. .	Ra.
--	-----

Addition thereto during the year not shown as loss or outgo in either the profit and loss or revenue account ..	Ra.
---	-----

Total ..	Ra.
----------	-----

Less amount written off during the year as per profit and loss or revenue account .. .. .	Ra.
---	-----

Balance at the end of year still shown as assets in the balance sheet .. .. .	Ra.
---	-----

4. The society may, if it so desires, show in this account the amount of commission on new business separately from commission on renewal premiums.

5. The items on the income side shall relate to income whether actually received or not and the items on the expenditure side shall relate to expenditure whether actually paid or not.

6. Any office premises which form part of the assets of any fund of the society shall be treated as an interest earning investment and accordingly in the revenue account a fair rent for the premises shall be included under the heading "Interest, Dividends and Rents" and a proper charge for the use thereof shall be included in the appropriate place in the expenses of management.

7. The following information shall be supplied in addition, namely, the gross premium income for each class of contingency for which the net premium income is shown separately in the revenue account. (See note 1.)

Form VIII.  
(See Rule 20.)

Balance Sheet of \_\_\_\_\_ as at \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ .

Shareholders' capital (each class to be stated separately)—	Rs. A. P.	Loans—	Rs. A. P.
Authorised— shares of Rs. _____ each Rs.		On mortgages of property .. ..	..
Subscribed— shares of Rs. _____ each Rs.		On security of municipal and other public rates. .. ..	..
		On stocks and shares .. ..	..
		On society's policies within their surrender value. .. ..	..
		On personal security .. ..	..
		To other provident societies and insurers	
Called up— shares of Rs. _____ each Rs. Less unpaid calls _____ Rs.		Investments— Deposit with the Reserve Bank of India (Securities to be specified). .. ..	..
Balances of Funds— To be specified separately as shown in the Revenue Account (Form VII). Balance of Profit and Loss Account ..		Indian Government Securities .. .. Provincial Government Securities .. .. British, British Colonial and British Dominion Government Securities. Foreign Government Securities .. ..	..

Form VIII—contd.

Debiture stock per cent	Rs.	A.	P.
Loans and advances (a) ..	..	..	..
Bills payable (a) ..	..	..	..
Estimated liability in respect of outstanding claims (b).	..	..	..
To be stated separately in respect of each fund shown in the Revenue Account (Form VII).	..	..	..
Annuities due and unpaid (b) ..	..	..	..
Outstanding dividends ..	..	..	..
Sundry creditors (including outstanding and accruing expenses and taxes) (c).	..	..	..
Other sums owing by the society (a) ..	..	..	..
Contingent liabilities (to be specified) (c) ..	..	..	..

Investments—contd.

Indian Municipal Securities ..  
 British and Colonial Securities ..  
 Foreign Securities ..  
 Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the Indian Government or a Provincial Government.  
 Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the British or any Colonial Government.  
 Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by any Foreign Government.  
 Debentures of any railway in India ..  
 Debentures of any railway out of India ..  
 Preference or guaranteed shares of any railway in India.  
 Preference or guaranteed shares of any railway out of India.  
 Railway Ordinary Stocks (i) in India, (ii) out of India.  
 Other Debentures and Debenture Stock of Companies incorporated (i) in India, (ii) out of India.

Rs. A. P.

Form VIII.—*concl.*

Rs. A. P.	Rs. A. P.
	<p><i>Investments—concl.</i></p> <p>Other guaranteed and preference Stocks and Shares of Companies incorporated (i) in India, (ii) out of India.</p> <p>Other ordinary Stocks and Shares of Companies incorporated (i) in India, (ii) out of India.</p> <p>Holdings in Subsidiary Companies ..</p> <p>House property (i) in India, (ii) out of India.</p> <p>Other investments (to be specified) ..</p> <p>Agents' Balances .. ..</p> <p>Outstanding premiums (b) (d) .. ..</p> <p>Interest, dividends and rents outstanding (b) ..</p> <p>Interest, dividends and rents accruing but not due (b).</p> <p>Sundry debtors .. ..</p> <p>Bills receivable .. ..</p> <p>Cash—</p> <p>At bankers on Deposit Account ..</p> <p>At bankers on Current Account and in hand.</p> <p>Other Accounts (to be specified) (e) .. ..</p>

*Footnotes to Balance Sheet—(Form VIII).*

(a) If the society has deposited security as cover in respect of any of these items the amount and nature of the securities so deposited shall be clearly indicated on the face of the balance sheet.

(b) These items are or have been included in the corresponding items in the revenue account or profit and loss account. Outstanding and accruing interest, dividend and rents shall be shown after deduction of income-tax or the income-tax shall be provided for amongst the liabilities on the other side of the balance sheet.

(c) Such items as amount of liability in respect of bills discounted, uncalled capital in respect of other investments, etc., shall be shown in their several categories under the heading "contingent liabilities" or the appropriate items on the assets side shall be set out in such detail as will clearly indicate the amount of uncalled capital.

(d) Either this item shall be shown net or the commission shall be provided for amongst the liabilities on the other side of the balance sheet.

(e) Under this heading shall be included such items as the following which shall be shown under separate headings suitably described:—

Office furniture, goodwill, preliminary, formation and organisation expenses, development expenditure account, discount on debentures issued, other expenditure carried forward to be written off in future years, adverse balance of profit and loss account, etc. The amounts included in the balance sheet shall not be in excess of cost.

*Statement and Certificates relating to the Balance Sheet.*

I. There shall be appended to the balance sheet a statement showing separately for every asset which is included in the balance sheet, the full title and particulars of the asset, and the value at which it is included in the above balance sheet, and in the case of assets being stock exchange securities, the nominal value and the market value as at the date of the balance sheet. In stating the market value of a stock exchange security no credit shall be taken in the statement for accrued interest.

II. To the balance sheet shall be appended:—

(a) A certificate signed by the same persons as are required to sign the balance sheet certifying that the values of all the assets have been reviewed as at the date of the balance sheet and that in their belief the assets set forth therein are shown in the aggregate at amounts not exceeding their realisable or market value under each of the several headings "Loans", "Investments", "Agents' Balances", "Outstanding premiums", "Interest, dividends and rents outstanding", "Interest, dividends and rents accruing but not due", "Sundry debtors", "Bills receivable" and the items entered under "Other accounts":

Provided that if the persons signing the certificate are unable to certify without reservation that the assets set forth in the balance sheet are so shown as aforesaid, a full explanation shall be given.

(b) A certificate signed by the auditor (which shall be in addition to any other certificate or report he is required by law to give with respect to the balance sheet) certifying that he has verified the cash balances, the loans and investments.

Form IX.

(See Rule 20.)

Statement under clause (a) (i) of sub-section (2) of section 80 in respect of (here insert name of provident society)  
for the year ending.....19.....

Contingencies on which sum assured or other benefit is payable.* (Classified according to the contingencies separately specified in section 65.)	New policies effected.			Existing policies discontinued.					
	Number of policies.	Total full sums insured.	Total premium income received.	By happening of contingency insured against.		Surrenders, forfeitures and lapses.		For other reasons.	
				No.	Sum insured and Bonus.	No.	Sum insured and Bonus.	No.	Sum insured and Bonus.
		Rs.	Rs.		Rs.		Rs.		Rs.

\* Where the provident society issues annuities either immediate or deferred the statement shall show the number of each class of such annuities, the annual sums payable, and the consideration received or the annual premium in the case of deferred annuities.

**Form X.**
*(See Rule 20.)*

Statement under clause (b) of sub-section (2) of section 80 in respect  
of (here insert name of provident society) for the year ending  
.....19....

—	No.	Sum insured.
		Rs.
<b>Policies effected—</b>		
By husband or wife .. .. .		
„ son .. .. .		
„ daughter .. .. .		
„ father .. .. .		
„ mother .. .. .		
„ brother .. .. .		
„ sister .. .. .		
„ grandson .. .. .		
„ grand-daughter .. .. .		
„ nephew .. .. .		
„ niece .. .. .		
„ any other person .. .. .		
<b>Total ..</b>		

**Form XI.**
*(See Rule 26.)*

It is hereby certified that all amounts received directly or indirectly at credit of the revenue account in respect of business transacted in India referred to in clause (b) of sub-section (2) of section 16 of the Act, whether from the head office of the insurer or from any other source outside India, have been shown in the afore-mentioned revenue account, except such sums as properly appertain to the capital account, and it is further certified that all expenditure, including claims, attributable to business in India, met during the year in question from sources arising outside India, has been shown in the said revenue account except such sums as properly appertain to the capital account.

Form XII.

(See Rule 27.)

Submitted by the \_\_\_\_\_ (here insert name of insurer) for the year ending.....19.....

	Dividing insurance policies insuring money to be paid on death or survival.		Dividing insurance policies insuring money to be paid on marriage.		And so on for each other class of dividing insurance business for which a separate revenue account is submitted.
	No.	*Minimum sum insured guaranteed. Rs.	No.	*Minimum sum insured guaranteed. Rs.	
1. Policies at beginning of year .. .. .					
2. New policies issued .. .. .					
3. Old policies revived .. .. .					
4. Old policies changed and increased .. .. .					
5. Bonus additions allotted .. .. .					
<b>Total</b> .. .. .					
<i>Discontinued during year—</i>					
6. By death .. .. .					
7. By survivals or the happening of the contingencies insured against other than death .. .. .					
8. By expiry of term under temporary insurances .. .. .					
9. By surrender of policy .. .. .					
10. By surrender of bonus .. .. .					
11. By forfeiture or lapse .. .. .					
12. By change and decrease .. .. .					
13. By being not taken up .. .. .					
<b>Total discontinued</b> .. .. .					
<b>Total existing at end of year</b> .. .. .					

\* If there be no minimum amount guaranteed to be paid on the happening of the contingency insured against, the column may remain blank.

**Form XIII.**

(See Rule 27.)

Submitted by the (here insert name of insurer) for the year ending  
..... 19.....

	Number of dividing insurance policies effected in the year under review insuring sums payable at death or survivorance.		
	Under table No. 1.	Under table No. 2.	And so on for each other table of dividing insurance business insuring sums payable at death or survivorance.
(1) Number of Policies insuring money to be paid on the death of a male life—			
Effected during the year by—			
the life insured .. ..			
his wife .. ..			
„ son .. ..			
„ daughter .. ..			
„ father .. ..			
„ mother .. ..			
„ brother .. ..			
„ sister .. ..			
any person other than the above relations .. ..			
(2) Number of Policies insuring money to be paid on the death of a female life—			
Effected during the year by—			
the life insured .. ..			
her husband .. ..			
„ son .. ..			
„ daughter .. ..			
„ father .. ..			
„ mother .. ..			
„ brother .. ..			
„ sister .. ..			
any person other than the above relations .. ..			
<b>Total number of Policies effected in the year</b>			

If the different tables be not distinguished from one another by numbers, as assumed in the above Form, the headings to the Form may be altered accordingly.

**Form XIV.**

(See Rule 27.)

Submitted by the (here insert name of insurer) for the year ending  
.....19.....

Age of life on the death of whom the policy monies become payable.	Number of dividing insurance policies effected in the year under review insuring sums payable at death or survivorance.			
	Under table No. 1.	Under table No. 2.	Under table No. 3.	And so on for each other table of dividing insurance business insuring sums payable at death or survivorance.
Under 5 years .. ..				
Over 5 and under 10 ..				
„ 10 „ 15 ..				
„ 15 „ 20 ..				
„ 20 „ 25 ..				
„ 25 „ 30 ..				
„ 30 „ 35 ..				
„ 35 „ 40 ..				
„ 40 „ 45 ..				
„ 45 „ 50 ..				
„ 50 „ 55 ..				
„ 55 „ 60 ..				
„ 60 „ 65 ..				
„ 65 „ 70 ..				
„ 70 .. ..				
Total number of policies effected in the year.	(These totals should agree with the totals in Form XIII.)			

If the different tables be not distinguished from one another by numbers, as assumed in the above Form, the headings to the Form may be altered accordingly.

# APPENDIX III

## TRANSFER OF PROPERTY ACT (IV OF 1882)

(As amended up to date)

(EXTRACTS FROM)

5. "Transfer of Property" defined.—In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, <sup>1</sup>[or to himself] and one or more other living persons; and "to transfer property" is to perform such act.

<sup>1</sup>[In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

6. What may be transferred.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

<sup>2</sup>[(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.]

(e) A mere right to sue <sup>3</sup> \* \* \* cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, <sup>4</sup>[naval], <sup>5</sup>[air force] and civil pensioners of <sup>6</sup>[the Crown] and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) <sup>7</sup>[for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872,] or (3) to a person legally disqualified to be transferee.

<sup>8</sup>[(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate

<sup>1</sup> Inserted by sec. 6 of the Transfer of Property (Amendment) Act (XX of 1929).

<sup>2</sup> Inserted, *ibid.*, sec. 7.

<sup>3</sup> Omitted by sec. 3 (i) of the Transfer of Property Act (II of 1900).

<sup>4</sup> Inserted by sec. 2 and Sched. of the Amending Act (XXXV of 1934).

<sup>5</sup> Inserted by sec. 2 and Sched. I of the Repealing and Amending Act (X of 1927).

<sup>6</sup> Substituted for the word "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

<sup>7</sup> Substituted for other words by sec. 3 (ii) of the Transfer of Property Act (II of 1900).

<sup>8</sup> Inserted by sec. 4 of the Transfer of Property Act (1882), Amendment Act (III of 1885).

in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.]

**7. Persons competent to transfer.**—Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

**8. Operation of transfer.**—Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and, where the property is machinery attached to the earth, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

**55. Rights and liabilities of buyer and seller.**—In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property<sup>1</sup> [or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

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<sup>1</sup> Inserted by sec. 17 of the Transfer of Property (Amendment) Act (XX of 1929).

- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer;
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer,<sup>1</sup> [any transferee without consideration or any transferee with notice of the non-payment], for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part<sup>1</sup> [from the date on which possession has been delivered].

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<sup>1</sup> Inserted by sec. 17 of the Transfer of Property (Amendment) Act (XX of 1929).

(5) The buyer is bound—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;
- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;
- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;
- (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;
- (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, <sup>1</sup> \* to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

**76. Liabilities of mortgagee in possession. Loss occasioned by his default.**—When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property—

- (a) he must manage the property as a person of ordinary prudence would manage it if it were his own;
- (b) he must use his best endeavours to collect the rents and profits thereof;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature <sup>2</sup> [and all rent] accruing

<sup>1</sup> Omitted by sec. 17 of the Transfer of Property (Amendment) Act (XX of 1929).

<sup>2</sup> Inserted, *ibid.*, sec. 40.

due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;

- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;
- (e) he must not commit any act which is destructive or permanently injurious to the property ;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;
- (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses<sup>1</sup> [properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest<sup>2</sup> \* \* \* and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;
- (i) when the mortgagor tenders, or deposits in manner herein-after provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his<sup>3</sup> \* \* \* receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be<sup>4</sup> [and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property].

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

**122. "Gift" defined. Acceptance when to be made.**—"Gift" is the transfer of certain existing moveable or immoveable property

<sup>1</sup> Inserted by sec. 40 of the Transfer of Property (Amendment) Act (XX of 1929).

<sup>2</sup> Omitted, *ibid.*

<sup>3</sup> The word "gross" was omitted, *ibid.*

<sup>4</sup> Inserted, *ibid.*

made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

**130. Transfer of actionable claim.**—(1) The transfer of an actionable claim <sup>1</sup>[whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, <sup>2</sup>\* \* \* shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

*Exception.*—Nothing in this section applies to the transfer of a marine or fire policy of insurance <sup>3</sup>[or affects the provisions of section 38 of the Insurance Act, 1938].

**131. Notice to be in writing, signed.**—Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

**132. Liability of transferee of actionable claim.**—The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

**133. Warranty of solvency of debtor.**—Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

**134. Mortgaged debt.**—Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery: secondly, in or towards

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<sup>1</sup> Inserted by sec. 62 of the Transfer of Property (Amendment) Act (XX of 1929).

<sup>2</sup> Omitted, *ibid.*

<sup>3</sup> Inserted by sec. 121 of the Indian Insurance Act (IV of 1938).

satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

**135. Assignment of rights under marine or fire policy of insurance.**—Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

**136. Incapacity of officers connected with Courts of Justice.**—No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims, so dealt with by him as aforesaid.

**137. Saving of negotiable instruments, etc.**—Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

*Explanation.*—The expression, “mercantile document of title to goods” includes a bill of lading, dock-warrant, ware-housekeeper’s certificate, railway-receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

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APPENDIX IV

**THE INDIAN CARRIAGE OF GOODS BY SEA  
ACT (XXVI OF 1925)**

(As amended up to date)

**An Act to amend the law with respect to the carriage of goods  
by sea.**

Whereas at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading;

And whereas at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference;

And whereas provision has been made by the Carriage of Goods by Sea Act, 1924, that the said rules as so amended and as set out with modifications in the Schedule shall, subject to the provisions of that Act, have the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading;

And whereas it is expedient that like provision should be made in British India; It is hereby enacted as follows:—

1. **Short title and extent.**—(1) This Act may be called the Indian Carriage of Goods by Sea Act, 1925.

(2) It extends to the whole of British India.

2. **Application of Rules.**—Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as “the Rules”) shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India.

3. **Absolute warranty of seaworthiness not to be implied in contracts to which Rules apply.**—There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

4. **Statement as to application of Rules to be included in bills of lading.**—Every bill of lading, or similar document of title, issued in British India which contains or is evidence of any contract to which the Rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

5. **Modification of Article VI of Rules in relation to goods carried in sailing ships and by prescribed routes.**—Article VI of the Rules shall, in relation to—

(a) the carriage of goods by sea in sailing ships carrying goods  
from any port in British India to any other port whether  
in or outside British India, and

- (b) the carriage of goods by sea in ships carrying goods from a port in British India notified in this behalf in the <sup>1</sup>[Official Gazette] by the <sup>2</sup>[Central Government] to a port in Ceylon specified in the said notification,

have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

6. **Modification of Rules 4 and 5 of Article III in relation to bulk cargoes.**—Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

7. **Saving and operation.**—(1) Nothing in this Act shall affect the operation of sections four hundred and forty-six to four hundred and fifty, both inclusive, five hundred and two, and five hundred and three of the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of sea-going vessels.

(2) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea before such day, not being earlier than the first day of January, 1926, as the <sup>2</sup>[Central Government] may, by notification in the <sup>1</sup>[Official Gazette], appoint, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

## SCHEDULE.

### RULES RELATING TO BILLS OF LADING.

#### ARTICLE I.

##### *Definitions.*

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say—

- (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper:
- (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar

<sup>1</sup> Substituted for other words by the Government of India (Adaptation of Indian Laws) Order, 1937.

<sup>2</sup> Substituted for other words, *ibid.*

document of title regulates the relations between a carrier and a holder of the same:

- (c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried:
- (d) "Ship" means any vessel used for the carriage of goods by sea:
- (e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

## ARTICLE II.

### *Risks.*

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

## ARTICLE III.

### *Responsibilities and Liabilities.*

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) make the ship seaworthy:
- (b) properly man, equip, and supply the ship:
- (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2 Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

- (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage:
- (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper:
- (c) The apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately

to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that, if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier, such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

#### ARTICLE IV.

##### *Rights and Immunities.*

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to

secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

- (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship:
- (b) fire, unless caused by the actual fault or privity of the carrier:
- (c) perils, dangers and accidents of the sea or other navigable waters:
- (d) act of God:
- (e) act of war:
- (f) act of public enemies:
- (g) arrest or restraint of princes, rulers or people, or seizure under legal process:
- (h) quarantine restriction:
- (i) act or omission of the shipper or owner of the goods, his agent, or representative:
- (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general:
- (k) riots and civil commotions:
- (l) saving or attempting to save life or property at sea:
- (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods:
- (n) insufficiency of packing:
- (o) insufficiency or inadequacy of marks:
- (p) latent defects not discoverable by due diligence:
- (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100*l.* per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

#### ARTICLE V.

##### *Surrender of Rights and Immunities, and Increase of Responsibilities and Liabilities.*

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

#### ARTICLE VI.

##### *Special Conditions.*

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other

## *Indian Carriage of Goods by Sea Act (XXVI of 1925) cxxxix*

shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

### ARTICLE VII.

#### *Limitations on the Application of the Rules.*

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

### ARTICLE VIII.

#### *Limitation of liability.*

The provisions of these Rules shall not affect the rights and obligations of the carrier under any Statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

### ARTICLE IX.

The monetary units mentioned in these Rules are to be taken to be gold value.

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## APPENDIX V

### YORK-ANTWERP RULES, 1924

The following Rules were adopted at the Conferences of the International Law Association held at Stockholm, September, 1924.

#### RULE A.

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

#### RULE B.

General average sacrifices and expenses shall be borne by the different contributing interests on the basis hereinafter provided.

#### RULE C.

Only such damages, losses or expenses which are the direct consequence of the general average act shall be allowed as general average.

Damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause, such as demurrage and loss of market, shall not be admitted as general average.

#### RULE D.

Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault.

#### RULE E.

The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

#### RULE F.

Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed, but only up to the amount of the general average expense avoided.

#### RULE G.

General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This rule shall not affect the determination of the place at which the average statement is to be made up.

**RULE I.—JETTISON OF CARGO.**

No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognized custom of the trade.

**RULE II.—DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY.**

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

**RULE III.—EXTINGUISHING FIRE ON SHIPBOARD.**

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

**RULE IV.—CUTTING AWAY WRECK.**

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

**RULE V.—VOLUNTARY STRANDING.**

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight or any of them by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

**RULE VI.—CARRYING PRESS OF SAIL—DAMAGE TO OR LOSS OF SAILS.**

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

**RULE VII.—DAMAGE TO ENGINES IN REFLOATING A SHIP.**

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the machinery and boilers shall be made good as general average.

**RULE VIII.—EXPENSES LIGHTENING A SHIP WHEN ASHORE, AND CONSEQUENT DAMAGE.**

When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred) and the loss or damage sustained thereby shall be admitted as general average.

**RULE IX.—SHIP'S MATERIALS AND STORES BURNT FOR FUEL.**

Ship's materials and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of fuel that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be credited to the general average.

**RULE X. (a).—EXPENSES AT PORT OF REFUGE, ETC.**

When a ship shall have entered a port or place of refuge, or have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

**RULE X. (b).**—The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

**RULE X. (c).**—Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the cost of reloading and stowing such cargo, fuel or stores on board the ship, together with all storage charges (including fire insurance, if incurred) on such cargo, fuel or stores, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average. In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, storage expenses, as above, shall be admitted as general average up to the date of completion of discharge.

**RULE X. (d).**—If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

**RULE XI.—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, ETC.**

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of repairs mentioned in Rule X., the wages payable to the master, officers and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average. In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, wages and maintenance of crew, as above, shall be admitted as general average up to the date of completion of discharge.

**RULE XII.—DAMAGE TO CARGO IN DISCHARGING, ETC.**

Damage to or loss of cargo, fuel or stores caused in the act of handling, discharging, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

**RULE XIII.—DEDUCTIONS FROM COST OF REPAIRS.**

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.:

In the case of iron or steel ships, from date of original register to the date of accident:

*Up to 1 year old (A)—*

All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.

*Between 1 and 3 years (B)—*

One-third to be deducted off repairs to and renewals of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal, and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, wireless apparatus, chain cables and chains, insulation, donkey engines, steam steering gear and connections, steam winches and connections, steam cranes and connections and electrical machinery; other repairs in full.

*Between 3 and 6 years (C)—*

Deductions as above under Clause B, except that one-third be deducted off insulation, and one-sixth be deducted off ironwork of masts and spars, and all machinery (inclusive of boilers and their mountings).

*Between 6 and 10 years (D)—*

Deductions as above under Clause C, except that one-third be deducted off ironwork of masts and spars, donkey engines, steam steering

gear, winches, cranes, and connections, repairs to and renewal of all machinery (inclusive of boilers and their mountings), wireless apparatus and all hawsers, ropes, sheets and rigging.

*Between 10 and 15 years (E)—*

One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.

*Over 15 years (F)—*

One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.

*Generally (G)—*

The deductions (except as to provisions and stores, insulation, wireless apparatus, machinery and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of the accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions, stores and gear which have not been in use.

In the case of wooden or composite ships:—

When a ship is under one year old from date of original register, at the time of accident, no deduction "new for old" shall be made. After that period a deduction of one-third shall be made, with the following exceptions:

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

When a ship is fitted with propelling, refrigerating, electrical or other machinery, or with insulation, or with wireless apparatus, repairs to such machinery, insulation or wireless apparatus to be subject to the same deduction as in the case of iron or steel ships.

In the case of ships generally:—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartage, use of shears, stages, and graving dock materials, shall be allowed in full.

**RULE XIV.—TEMPORARY REPAIRS.**

Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average; but where temporary repairs of accidental damage are effected merely to enable the adventure to be completed, the cost of such repairs shall be admitted as general average only up to the saving in expense

which would have been incurred and allowed in general average had such repairs not been effected there.

No deductions "new for old" shall be made from the cost of temporary repairs allowable as general average.

**RULE XV.—LOSS OF FREIGHT.**

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

**RULE XVI.—AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE.**

The amount to be made good as general average for damage to or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure where this ends at a place other than the original destination.

Where goods so damaged are sold after arrival, the loss to be made good in general average shall be calculated by applying to the sound value on the date of arrival of the vessel the percentage of loss resulting from a comparison of the proceeds with the sound value on date of sale.

**RULE XVII.—CONTRIBUTORY VALUES.**

The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure, to which values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the shipowner's freight and passage money at risk, of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects not shipped under bill of lading shall not contribute in general average.

**RULE XVIII.—DAMAGE TO SHIP.**

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear when repaired or replaced shall be the actual reasonable cost of repairing or replacing such damage or loss, deductions being made as above (Rule XIII.) when old material is replaced by new. When not repaired, the reasonable depreciation shall be allowed, not exceeding the estimated cost of repairs.

Where there is an actual or constructive total loss of the ship the amount to be allowed as general average for damage or loss to the ship caused by a general average act shall be the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the proceeds of sale, if any.

**RULE XIX.—UNDECLARED OR WRONGFULLY DECLARED CARGO.**

Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

**RULE XX.—EXPENSES BEARING UP FOR PORT, ETC.**

Fuel and stores consumed, and wages and maintenance of master, officers and crew incurred, during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X. (a).

Fuel and stores consumed during extra detention in a port or place of loading, call or refuge shall also be allowed in general average for the period during which wages and maintenance of master, officers and crew are allowed in terms of Rule XI., except such fuel and stores as are consumed in effecting repairs not allowable in general average.

**RULE XXI.—PROVISION OF FUNDS.**

A commission of 2 per cent. on general average disbursements shall be allowed in general average, but when the funds are not provided by any of the contributing interests, the necessary cost of obtaining the funds required by means of a bottomry bond or otherwise, or the loss sustained by owners of goods sold for the purpose, shall be allowed in general average.

The cost of insuring money advanced to pay for general average disbursements shall also be allowed in general average.

**RULE XXII.—INTEREST ON LOSSES MADE GOOD IN GENERAL AVERAGE.**

Interest shall be allowed on expenditure, sacrifices and allowances charged to general average at the legal rate per annum prevailing at the final port of destination at which the adventure ends, or where there is no recognized legal rate, at the rate of 5 per cent. per annum, until the date of the general average statement, due allowance being made for any interim reimbursement from the contributory interests or from the general average deposit fund.

**RULE XXIII.—TREATMENT OF CASH DEPOSITS.**

Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid into a special account, earning interest where possible, in the joint names of two trustees (one to be nominated on behalf of the shipowner and the other on behalf of the depositors) in a bank to be approved by such trustees. The sum so deposited, together with accrued interest,

if any, shall be held as security for and upon trust for payment to the parties entitled thereto of the general average, salvage or special charges payable by the cargo in respect of which the deposits have been collected. The trustees shall have power to make payments on account or refunds of deposits which may be certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

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## APPENDIX VI

## THE INDIAN CARRIAGE BY AIR ACT (XX OF 1934)

(EXTRACTS FROM)

2. Application of the Convention to British India.—(1) The rules contained in the First Schedule, being the provisions of the convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, shall, subject to the provisions of this Act, have the force of law in British India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage.

## FIRST SCHEDULE.

(See section 2.)

## RULES.

## CHAPTER I.

## SCOPE—DEFINITIONS.

1. (1) These rules apply to all international carriage of persons, luggage or goods performed by aircraft for reward. They apply also to such carriage when performed gratuitously by an air transport undertaking.

(2) In these rules "High Contracting Party" means a High Contracting Party to the Convention.

(3) For the purposes of these rules the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to the Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of these rules.

(4) A carriage to be performed by several successive air carriers is deemed, for the purposes of these rules, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

2. (1) These rules apply to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in rule 1.

(2) These rules do not apply to carriage performed under the terms of any international postal Convention.

## CHAPTER II.

### DOCUMENTS OF CARRIAGE.

#### *Part I.—Passenger ticket.*

3. (1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:—

- (a) the place and date of issue;
- (b) the place of departure, and of destination;
- (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
- (d) the name and address of the carrier or carriers;
- (e) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the Schedule which exclude or limit his liability.

#### *Part II.—Luggage ticket.*

4. (1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

(2) The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The luggage ticket shall contain the following particulars:—

- (a) the place and date of issue;
- (b) the place of departure and of destination;
- (c) the name and address of the carrier or carriers;
- (d) the number of the passenger ticket;
- (e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket;
- (f) the number and weight of the packages;
- (g) the amount of the value declared in accordance with rule 22 (2);
- (h) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(4) The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d), (f) and (h) of sub-rule (3), the carrier shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

*Part III.—Air consignment note.*

5. (1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note"; and every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of rule 9, be none the less governed by these rules.

6. (1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign an acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

7. The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

8. The air consignment note shall contain the following particulars:—

- (a) the place and date of its execution;
- (b) the place of departure and of destination;
- (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
- (d) the name and address of the consignor;
- (e) the name and address of the first carrier;
- (f) the name and address of the consignee, if the case so requires;
- (g) the nature of the goods;
- (h) the number of the packages, the method of packing and the particular marks or numbers upon them;
- (i) the weight, the quantity and the volume or dimensions of the goods;
- (j) the apparent condition of the goods and of the packing;
- (k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;
- (l) if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;
- (m) the amount of the value declared in accordance with rule 22 (2);
- (n) the number of parts of the air consignment note;
- (o) the documents handed to the carrier to accompany the air consignment note;
- (p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed.

(g) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

9. If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in rule 8 (a) to (i) inclusive and (g), the carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability.

10. (1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

(2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

11. (1) The air consignment note is *prima facie* evidence of the conclusion of contract, of the receipt of the goods and of the conditions of carriages.

(2) The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor or relate to the apparent condition of the goods.

12. (1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or, by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with rule 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

13. (1) Except in the circumstances set out in rule 12, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

14. The consignor and the consignee can respectively enforce all the rights given them by rules 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

15. (1) Rules 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of rules 12, 13 and 14 can only be varied by express provision in the air consignment note.

16. (1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

### CHAPTER III.

#### LIABILITY OF THE CARRIER.

17. The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

20. (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent piloting or

negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

21. If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may exonerate the carrier wholly or partly from his liability.

22. (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value of the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of 65½ milligrams gold of millesimal fineness 900.

23. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule.

24. (1) In the cases covered by rules 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Schedule.

(2) In the cases covered by rule 17 the provisions of sub-rule (1) also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

25. (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

26. (1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

27. In the case of the death of the person liable, an action for damages lies in accordance with these rules against those legally representing his estate.

28. An action for damages must be brought at the option of the plaintiff, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

30. (1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in sub-rule (4) of rule 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Schedule, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

## CHAPTER IV.

### PROVISIONS RELATING TO COMBINED CARRIAGE.

31. (1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Schedule apply only to the carriage by air, provided that the carriage by air falls within the terms of rule 1.

(2) Nothing in this Schedule shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Schedule are observed as regards the carriage by air.

## CHAPTER V.

### GENERAL AND FINAL PROVISIONS.

32. Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Schedule, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of goods arbitration clauses

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are allowed, subject to these rules, if the arbitration is to take place in the territory of one of the High Contracting Parties within one of the jurisdictions referred to in rule 28.

33. Nothing contained in this Schedule shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Schedule.

34. This Schedule does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

35. The expression "days" when used in these rules means current days, not working days.

36. When a High Contracting Party has declared at the time of ratification of or of accession to the Convention that the first paragraph of Art. 2 of the Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority, these rules shall not apply to international carriage by air so performed.

### SECOND SCHEDULE.

(See section 2.)

#### PROVISIONS AS TO LIABILITY OF CARRIERS IN THE EVENT OF THE DEATH OF A PASSENGER.

1. The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

In this rule the expression "member of a family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother, half-sister, child, step-child, grand-child :

Provided that, in deducing any such relationship as aforesaid any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

2. An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is under the last preceding rule enforceable, but only one action shall be brought in British India in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in British India, or, not being domiciled there, express a desire to take the benefit of the action.

3. Subject to the provisions of the next succeeding rule the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court may direct.

4. The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside British India in respect of the death of the passenger in question.



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## ***Alphabetical List of Insurance Companies in India.***

**GLADSTONE, WATKIE AND CO.** London Correspondents, Gladstone Lyall & Co., 36 Lime Street, E.C. 3. Lloyd's Agents, Representatives and Claims Assessors for Insurance Companies. 4 Fairlie Place, Calcutta. Telephone, Calcutta 4626.

**LIVERPOOL AND LONDON AND GLOBE INSURANCE CO., LTD., THE.** Established in India in 1853. Fire, Loss of Profits, Motor Car, Burglary, Workmen's Compensation, Fidelity Guarantee, Court Bonds, Money in transit. 26 and 27 Dalhousie Square, Calcutta. Also at Forbes Buildings, Home Street, Bombay.

**LONDON AND LANCASHIRE INSURANCE CO., LTD., THE.** Fire, Marine and all classes of Accident business transacted. Indian Branches: Calcutta, 2 Fairlie Place; Bombay, 15 and 15A Elphinstone Circle; Lahore, The Mall. Agencies throughout India.

**MOTOR UNION INSURANCE CO., LTD., THE.** Head Office for India, Jehangir Wadia Building, Esplanade, Fort, Bombay. Manager for India, W. A. Clarke, Esq. Calcutta Branch, 1 and 2 Old Court House Corner; V. G. Alexander and J. Swain, Joint Branch Secretaries.

**NEW ZEALAND INSURANCE CO., LTD., THE.** Chief Office for India and Burma, 26 Dalhousie Square West, Calcutta. BOMBAY Branch, 16 Churchgate Street, Bombay; RANGOON Branch, Phayre Street, Rangoon.

**NORTHERN ASSURANCE CO., LTD., THE.** (Incorporated in Great Britain with limited liability): Established 1836. Assets exceed £24,000,000. Head Offices:—London and Aberdeen. Calcutta Branch:—Allen House, 7 Hare Street. Manager for India—E. W. Wright. Telegraphic address—"Indemnity", Calcutta; Telephone, Calcutta 2818.

**NORWICH UNION INSURANCE SOCIETIES.** Founded 1797 and 1808. Total Assets £50,000,000. All classes of Insurance transacted. Head Offices, Norwich, England. Represented in all principal towns and cities in India, Burma and Ceylon.

**OCEAN ACCIDENT AND GUARANTEE CORPORATION, LTD.** Specialists in Casualty insurance. Motor, Personal Accident and Sickness, Workmen's Compensation, Burglary, All Risks, Guaranteed, Public Liability, etc. 32 Dalhousie Square, Calcutta. Branches: Churchgate Street, Fort, Bombay; The Mall, Lahore; 169 Popham's Broadway, Madras; 128 Phayre Street, Rangoon.

**PRUDENTIAL ASSURANCE CO., LTD., THE.** Established in England, 1848. The largest Assurance Corporation in the British Commonwealth of Nations. Assets Rs. 4,61,00,00,000. Principal Agents, Messrs. Gillanders Arbuthnot & Co., Clive Buildings, Calcutta. Telephone, Calcutta 6666. Branches: Bombay, New Delhi, Lahore, Madras, Rangoon. Manager for India, Burma and Ceylon, S. C. Darby.

**SOUTH BRITISH INSURANCE CO., LTD., THE.** Founded 1872. Liability of Shareholders limited. Fire, Marine, Accident. Calcutta Office, 5 Clive Street; Bombay Office, Hornby Road, Fort. Telegraphic Address, "British"; Telephone Nos. Calcutta 5320; Bombay 26244.

